72-31

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-313

ROBERT W. KELLEY, et al., HENRY C. MAXWELL, JR., et al.,
Respondents,

v.

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, C. R. DORRIER, Chairman, et al.,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported, but is set out in its entirety as Appendix "B" to this petition at pages A-25–A-65. The opinion of the District Court likewise has not yet been officially reported insofar as we can ascertain, but is set out as Appendix "A" at pages A-1–A-24.

JURISDICTION

The opinion and order of the United States Court of Appeals for the Sixth Circuit was entered on May 30, 1972. A petition for stay pending the filing of a petition for certiorari to this Honorable Court was denied by the Court of Appeals for the Sixth Circuit on July 25, 1972 (Appendix "C", p. A-66).

QUESTIONS PRESENTED

1. The District Court made no finding that assignment of children to the school nearest their home would not effectively dismantle the city's dual school system to the extent that it was state-imposed. Nevertheless, the District Court ordered cross-town busing with some bus rides as long as three hours, necessitating staggered openings of schools (from 7 A. M. to 10 A. M.) and staggered closings (from 1:30 P. M. to 4:30 P. M.), with the result that in winter months young children walked to pick-up points before daylight, and walked home after dark, along streets sometimes unlighted and sometimes without sidewalks. Did the Court of Appeals err in affirming the judgment despite the absence of any finding by the District Court that such busing was necessary to eliminate state imposed segregation?[1]

2. The District Court approved a plan for the desegregation of schools which fixed a definite percentage of racial mix for each school and directed no deviation therefrom which would lessen the degree of fixed racial mix. Was the Court of Appeals in error in affirming the District Court on the theory that **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U. S. 1, permitted (required) such as a matter of substantive constitutional law?

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[1] This obviously creates situations where working mothers with three or more school children are forced to leave for work before the children leave for school and children can be unattended for as much as two and a half hours before school.

3. Without compliance with Rule 23 of the Federal Rules of Civil Procedure, the District Court entered a judgment requiring the busing of children of a class of which none of the plaintiffs was a member. Did failure of the parties to invoke Rule 23 prior to judgment constitute a waiver which relieved the Court of its duty of compliance and thereby validated the judgment?

STATUTES INVOLVED

This petition for certiorari involves no statute, but involves Rule 23 of the Federal Rules of Civil Procedure and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This case originated in 1955 when suit was instituted by Robert W. Kelley et al., seeking desegregation of the Nashville school system only. In 1960 the Henry C. Maxwell, Jr., et al., case was filed and it sought desegregation of the Davidson County schools. Subsequently, the governments of the City of Nashville and of Davidson County were consolidated, and in September, 1963, the two cases were likewise consolidated. Prior to September, 1963, the Court had approved plans for the desegregation of each of the two school systems which were substantially identical. After the consolidation of the governments of Nashville and Davidson County there was only one school board and it was known as the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, which is the petitioner here.

Following petitions in the consolidated desegregation cases based upon the insistence that the school system was not complying with new concepts for desegregation as announced by this Honorable Court, and hearings before the then district judge, the Honorable William E. Miller, the petitioning school board submitted plans and

hearings were had before Judge Miller and his successor, Judge L. Clure Morton, which began in March of 1971, and continued, though not continuously, through June 9, 1971. The hearing before Judge Morton was predicated upon pleadings filed by some of the original plaintiffs and some additional plaintiffs, and alleged that the original plaintiffs had either graduated or were enrolled in schools which were desegregated, and sought leave for additional students of Cameron High School to intervene and become plaintiffs, which was allowed. The only named plaintiff or intervening plaintiff remaining in school at the time of the hearing and at the time of the decision in the District Court was a student in senior high school.

At the hearing the Court rejected the plan submitted by the school board and the plan submitted by plaintiffs. The Court requested the Department of Health, Education and Welfare to submit a plan and adopted the plan submitted with minor variations. Basically, the plan contemplated cross-town busing of black students to formerly white schools in grades one through six and the transportation of white students to formerly all black or predominantly black schools in the other grades so that the nonelementary grades would occupy the space vacated by the elementary grades during the school day. As a part of the plan the District Judge adopted the charts appearing at pages A-21 through A-24 of Appendix "A", which charts fixed a definite percentage of racial mix for each school, and the District Court in its opinion, at page A-11 of Appendix "A", authorized the board of education to make minor alterations in the boundaries, provided such alterations did not lessen the degree of segregation in the plan.

After the plan adopted by the District Court was implemented, the director of schools filed a report attached as Appendix "D" to this petition, which report reflects the hardships encountered in the execution of the plan.

ARGUMENT

Question 1

This Court has previously pointed out in its opinions, and especially **Swann v. Charlotte Mecklenburg Board of Education**, *supra*, that the hardships of the plan adopted on the students being transported, the danger to the health and safety of the children and the extreme difficulty of complying with the plan, as exemplified by the staggered hours and opening and closing of the schools, are all matters which should be considered in determining whether the plan or remedy adopted by the District Court is erroneous. The anticipated hardships suggested to the District Court became apparent when the plan was implemented, as shown by report filed with the District Court by the director of schools, attached hereto as Appendix "D". In the late fall and winter, according to the weather bureau, the report shows the sun ries at 6:39 A. M. on December 1 and sets at 4:32 P. M. In order to comply with the plan formulated by the District Court it was necessary that 133 school openings be staggered to begin at thirty minute intervals from 7 A. M. to 10 A. M., and closings staggered at thirty minute intervals with the latest schools let out at 4 P. M. and 4:30 P. M. Buses serving schools opening at 7 A. M. begin their routes at 6:05 A. M., which is thirty-four minutes before sunrise on December 1. Children must walk from their homes to designated pick-up points, and consequently those picked up at the beginning of the route may be on the street as much as an hour before sunrise. Children who live within a mile and a half of the school to which they are assigned (and for whom buses are therefore not available) have to leave home in time for 7 A. M. openings, necessitating many of

them walking to their designated school in darkness, and of those attending schools opening at a later time some will return home from school walking in darkness. In many instances the report shows these children are walking along streets without either street lights or sidewalks, or street lights and no sidewalks or sidewalks and no street lights (Appendix "D", pp. A-67–A-74).

The average time of a student on a bus transported across town is forty-five minutes each way and the longest period of time required for cross-town transportation is one and one-half hours each way. Thus the average time of a student on a bus transported across town is a total of one and one-half hours of riding time and the longest three hours of riding time. Twenty-eight thousand students are transported from the suburbs to the inner city or vice versa each day, and approximately 400 round trips are required across town daily by the 211 buses.

It thus results that the plan adopted by the District Court and approved by the Court of Appeals has resulted in substantial hardship to the children, both from the point of view of time required to be on the bus and the point of view of health and safety, and thus trespasses the limits on school bus transportation indicated by this Honorable Court in the opinion on the application to stay in the case of **Winston-Salem etc. v. Catherine Scott et al.**, filed by the Honorable Chief Justice as the Circuit Justice on August 31, 1971, and further the opinion of this Court in the **Swann** case, 402 U. S. 29-31.

Since **Swann** the test of a plan of integration is whether it is feasible, workable, effective and realistic. A plan which exposes children to the hardships enumerated above cannot possibly meet any of these criteria.

Question 2

The plan formulated by the District Court and approved by the Court of Appeals, as shown by the tables attached to the District Court's opinion (Appendix "A"), clearly shows that the Court fixed a definite percentage of racial mix, at least for elementary school children (Appendix "A", pp. A-21, A-24), from which there could be no deviation lessening the percentage of mix. Apparently such was predicated upon the same misconception of the holding of this Honorable Court as was noted by Chief Justice Burger in the **Winston-Salem** opinion on the application to stay, where the Chief Justice in referring to the **Swann** case quoted in part as follows:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

Although the opinion of the District Court shows unmistakably by its frequent reference to the **Swann** opinion that the Court was attempting to be guided by it, the result is that the Court finds in formulating the plan and order based thereon, especially with the elementary schools, that a particular degree of racial balance or mix was required as a matter of substantive constitutional right.

This error was compounded, we respectfully submit, by the Court of Appeals in affirming the District Court's judgment.

Question 3

It is the petitioner's insistence that it is the duty of the plaintiff in an alleged class action to sustain the action in compliance with Rule 23. Upon failure of the plaintiff to do so, the defendant may challenge the action as a class action. But whether either the plaintiffs or the defendants challenge the action as a class action, or the appropriateness of the class, Rule 23 requires a finding by the Court prior to judgment that the plaintiffs will fairly and adequately protect the interests of the class. There was no such finding by the District Court, nor was there a finding of who constituted the class.

This Honorable Court, on Monday, February 28, 1966, entered its order approving amendments and additions to the Rules of Civil Procedure which were to take effect July 1, 1966, and were to govern all proceedings in actions brought thereafter and in all further proceedings in actions then pending, except to the extent that in the opinion of the Court application in a particular action then pending would not be feasible or would work an injustice. Among the amendments and additions is the new Rule 23 relating to class actions, subsection (c) of which requires the District Court as soon as practicable after the commencement of an action brought as a class action to determine by **order** (emphasis ours) whether it is to be so maintained. Such determination would require the trial court to make findings contemplated by Rule 23(a), (b) and (c), or a finding to the effect that the application of Rule 23 to a pending action was not feasible or would work an injustice. No such order was entered in these cases and no finding was in fact made, even though only one named plaintiff remained in school at the time of the trial of the cases in 1971, and this named plaintiff was in senior high school. There was no plaintiff at the time of the trial in 1971, representing the elementary

school grades or children, and none representing the junior high school grades or children. There was no finding by the trial court of who constituted the class for whose benefit the action was brought or that plaintiff would adequately and fairly represent the interest of the class, as required by Rule 23(c), but the relief ordered was substantially different for the kindergarten and elementary grades from that ordered for the junior and senior high schools.

For example, at the elementary grade level the plan required the cross-town transportation of black children to white or predominantly white schools. The plan did not require transportation of white children at the elementary grade level. The only plaintiff remaining in school at the time of the trial of this case was in senior high school. So it is that the elementary grades had no representative before the Court to speak for them, notwithstanding the fact that the decree was to be binding on the elementary grade students and res adjudicata of their rights.

The District Court and the Court of Appeals, without passing upon the validity of this requirement, simply held that the same was waived by the plaintiff, whereas the rule is directed to the duty of the Court and not the duty of the parties. It is respectfully submitted that the Court of Appeals erred in affirming the District Court's total disregard of Rule 23.

CONCLUSION

This petition for certiorari should therefore be granted so that the meaning of **Swann** can be further clarified and the application of Rule 23 to this proceeding be determined for the protection of the class in the future.

Respectfully submitted

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APPENDIX "A"

MEMORANDUM OPINION

(Filed June 28, 1971)

History of Litigation

The original action seeking school desegregation of the Nashville school system was filed in September, 1955.[1] Finally, on July 16, 1970, after the gradual evolvement of the present status of the law, this United States District Court, speaking through the Honorable William E. Miller, held that the local school board had not met its affirmative duty to abolish the dual school system in three categories: pupil integration, faculty integration, and site selection for school construction. **Kelley v. Metropolitan County Board of Education,** 317 F. Supp. 980 (M.D. Tenn. 1970). The approval and implementation of a plan to correct the adjudicated wrongs was delayed until the Sixth Circuit Court of Appeals ordered immediate hearings for that purpose.

Background Data

The Metropolitan school system consists of three divisions. The elementary schools accommodate students from kindergarten through the sixth grade. Junior high accommodates grades seven through nine. Senior high consists of grades nine through twelve.

In the 1970-71 school year a total of 94,170 students attended the Metropolitan schools. Of this number, 33,485 were transported by the Metropolitan school system. Of

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[1] Reference to the separate and later consolidated actions regarding the City of Nashville and Davidson County systems is omitted for brevity.

the total transported, less than 4,000 were black and approximately 30,000 were white.

One hundred forty-one schools were operated in the Metropolitan school system during the 1970-71 school year. The racial breakdown of the students was:

black	23,533
white	71,754
other	237

The percentage breakdown was:

black	24.63%
white	75.12%
other	.25%

Plans Submitted for Court Approval

School Board Plan

The Board of Education submitted a plan for pupil integration in August, 1970. Included in this plan was a policy statement that the school board "accepts as an ideal student racial ratio of an integrated school as one which is 15% to 35% black."[2]

The August, 1970 plan made 49 minor geographic zone changes, and provided for the transportation of an additional 1162 pupils.[3] The result of the plan was to leave the elementary schools significantly unchanged. Six of the 38 high schools and junior high schools would remain at least 50 per cent black. Fifty-seven per cent of the black high school and junior high school students would

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[2] The testimony of expert witnesses indicates that the accepted and satisfactory norm is a range from 10 per cent below to 10 per cent above the percentage of black students enrolled in a school system.

[3] McGavock, a recently erected high school, was not included in the August, 1970 plan.

attend these six schools. The racial composition of two schools would be at least 95 per cent black and four other schools would be at least 90 per cent black. This would result in 47 per cent of the black students attending schools where the composition would be above 90 per cent black. Eight schools, accommodating 20 per cent of the black students, would operate with 15-35 per cent black students. Fifteen schools would operate with 95 per cent or above white students.

On the last day of the hearings, which were held on several days over a three-month period, the school board submitted an amendment providing for the selection of students for McGavock School by paring.

Plaintiffs' Plan

Elementary Schools. Plaintiffs, through clustering and pairing, using both contiguous and non-contiguous zoning, proposed to effect in most elementary schools, through two alternate plans, a mathematical ratio in the range of 15-35 per cent black. Plan I would require the transportation of 25,500 elementary students, and Plan II would require the transportation of 27,000 pupils. Eighty-two of 100 schools would fall within the ideal ratio under Plan I, while under Plan II, 91 schools would attain the indicated ratio.

Secondary Schools. A model was submitted which included sectoring, clustering and pairing to attempt to attain 15-35 per cent black in the junior and senior high schools. In both the elementary and secondary school plans there is not a satisfactory description of grade organization, structuring of the schools, the assignment of the pupils, or definite zone description. The plans propose the mathematical result indicated, but delegate to the school board the actual assignment of pupils and implementation of the plan.

HEW Plan A as Amended[4]

At the request of the Court, the Department of Health, Education and Welfare submitted a plan with two alternates. The principal plan was designated as Plan A. This plan incorporates geographic zone changes, clustering, pairing (both contiguous and non-contiguous), and grade restructuring.

Elementary Schools. Five schools would be closed.[5] Seventy-four schools would have a racial percentage of 16-41 per cent black. Twenty-two schools which are located in the far reaches of the county would have a racial percentage of 0-11 per cent black. Three of those 22 would have no blacks. Under Plan A there would be no elementary school in the system with a black student enrollment of more than 41 per cent. Fifty-nine per cent of the black students in the system would attend schools with a black student enrollment of between 35 and 41 per cent. Three per cent of the black students in the system would attend schools with a black student enrollment of less than 15 per cent. Twenty-four per cent of the total number of white students in the system would attend schools in which black enrollment is less than 5 per cent. One per cent of the total black student enrollment in 16 schools, or 125 students, would be enrolled in schools with less than 5 per cent black student enrollment.

Under this plan, approximately 22,000 elementary school students would be eligible for school-provided transportation. This is approximately 10,500 more than the Board

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[4] Adjustments were made to shorten transportation routes, to incorporate the school board plan for McGavock School, to adjust the student makeup of Pearl High School.

[5] Three of the five schools to be closed are rated unsatisfactory by the consultants hired by the school board. The other two are listed as inadequate.

transported in 1970-71, and 9,700 more than those who would be transported under the Board's proposed plan. Three thousand five hundred fewer students would be transported under HEW Plan A than under the plaintiffs' Plan I, and some 5,000 fewer than would be transported under plaintiffs' Plan II.

Junior High Schools. This plan incorporates the school board amendment to the August, 1970 plan. Eighteen of 25 schools would have a racial composition of 20-40 per cent black. Seven schools would have a composition ranging from 0-5 per cent black. These seven schools are in the outer reaches of the county. Some former senior high schools would be changed to junior high schools. Two high schools would be closed.

Senior High Schools. This plan incorporates the school board amendment to the August, 1970 plan. Central High School would be closed. MaGavock High School is to be opened. Of the 18 schools, 11 would have 18-44 per cent black. One would have an 11 per cent enrollment of blacks and six would be virtually all white. These all-white schools are located in the outer reaches of the county.

An analysis of the HEW amended plan with regard to the secondary schools reflects that:

(1) no school would operate with more than 44 per cent black;

(2) 29 of the 43 schools would operate within the range of 15-44 per cent black, with one additional school having 11 per cent black;

(3) 13 schools, primarily in the outer reaches of the county, would have 95 per cent or more white;

(4) 67 per cent of the schools, housing 90 per cent of the black students, would operate in the 15-44 per cent black range;

(5) transportation would be required for 26,673 junior and senior high school students; and

(6) including the transportation necessary for McGavock School, 2,838 more secondary pupils would require transportation than were transported in the 1970-71 school year.

Objective, Test, and Methods

Objective

> "The objective today remains to eliminate from public schools all vestiges of state-imposed segregation." **Swann v. Charlotte-Mecklenburg Board of Education**, ... U.S. ..., 28 L.Ed.2d 554, 566 (April 20, 1971).

The Supreme Court has stated that "[t]he objective is to dismantle the dual school system," **Swann**, *supra*, at 573, ". . . to eliminate invidious racial distinctions," **Swann**, *supra*, at 568, and ". . . to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." **Davis v. Board of School Commissioners**, ... U.S. ..., 28 L.Ed.2d 577, 581 (April 20, 1971).

Test

A plan "that promises realistically to work, and promises realistically to work **now**" is required. **Davis**, *supra*, at 581, quoting **Green v. County School Board**, 391 U.S. 430 (1968). A plan "is to be judged by its effectiveness." **Swann**, *supra*, at 572; **Davis**, *supra*, at 581. A plan "is not acceptable simply because it appears to be neutral." **Swann**, *supra*, at 573.

Methods to Accomplish Objective

The following methods have been acknowledged by the United States Supreme Court: (1) restructuring of attendance zones, both contiguous and non-contiguous; (2)

restructuring of schools; (3) transportation; (4) sectoring; (5) non-discriminatory assignment of pupils; (6) majority to minority transfer; and (7) clustering, grouping and pairing. **Swann,** *supra*; **Davis,** *supra.*

Discussion of Plans Submitted

The pupil integration plan submitted by the school board, viewed in the most favorable light, constitutes mere tinkering with attendance zones, and represents only a token effort. It clearly falls short of meeting the objectives and tests set out in the decisions of the United States Supreme Court. **Swann v. Charlotte-Mecklenburg Board of Education,** *supra*; **Davis v. Board of School Commissioners,** *supra*; **Green v. County School Board,** 391 U.S. 430 (1968). In effect, the defendant has made no effort to meet its affirmative duty to establish a unitary school system "in which racial discrimination would be eliminated root and branch."[6] **Green v. County School**

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[6] Based on defendants' school statistics for 1969-70, the student enrollment was 95,789. The total majority to minority rezoned under this plan is:

Elementary		
whites gained in black schools	301	
blacks gained in white schools	457	
	758	majority to minority transfer in elementary
Junior High		
whites gained in black schools	430	
blacks gained in white schools	400	
	830	majority to minority transfer in junior high
Senior High		
whites gained in black schools	73	
blacks gained in white schools	735	
	808	majority to minority transfer in senior high

Board, *supra,* at 437-38; quoted in **McDaniel v. Barresi,** ... U.S. ..., 28 L.Ed.2d 582, 585 (April 20, 1971).

Since the defendants have, in effect, failed to submit a constitutionally sufficient plan, the Court must examine the other plans. The plaintiffs' plans as to elementary schools are adequate in one respect. Under Plan I, 82 out of 100 schools would be within the indicated range of 15-35 per cent black, which was set by the school board. Plan II would satisfy this standard in 91 out of 100 schools. This plan, however, has two features which are objectionable to the Court. The first is that actual assignment of student, i.e., the locations from which they come, is left to the school board. The historical reluctance by the school board to solve this problem instills a lack of confidence in their implementation of this aspect without close supervision. The second objection is that some schools in the outer reaches of the county are included. The Court finds that costs and other problems incident to transportation make this feature of plaintiffs' plan impractical and not feasible.

Each and every school is not required to be integrated. The test is a unitary school system. **Swann,** *supra.* The practicality and feasibility of a plan is a material consideration. **Swann,** *supra.*

The cost of the transportation of students and the unnecessary disruption of the students are proper considerations. The Court finds that distance and transportation difficulties make the integration of these schools highly impractical.

Plaintiffs plan for the desegregation of secondary schools, as in their elementary plan, was a model using sectoring, zoning (contiguous and non-contiguous), and pairing to accomplish the indicated racial balance. In neither the elementary plan nor the secondary model is there a description of grade organization, structuring of

the schools, the assignment of pupils, or proper description of zoning. For the reasons set forth as to the elementary school programs, the secondary school plan of the plaintiffs is rejected.

The plans of the plaintiffs and defendants being rejected for the reasons stated, the HEW plan is the only realistic plan remaining before the Court. As a result of the evidence produced at the hearing, the HEW plan was amended to effect the following changes:

(1) adjustment of the black percentage of North High School from 65 per cent black to 44 per cent black, and the reduction at Pearl High School to 33 per cent black, with corresponding adjustments in Stratford, Maplewood, and other schools;

(2) shortening the time of transportation of certain pupils; and

(3) incorporation of the McGavock High School phase of the defendants' amended plan.

On the last day of the hearings the defendants presented an amendment to its August, 1970 plan. This amendment provided that McGavock would be a comprehensive high school serving an area where several junior high schools are located. Although this amendment applied only to a small sector of the secondary school system, it reflected the beginning of an awareness by the defendants of their affirmative constitutional responsibility. The defendants indicate a desire to make similar proposals in the future, which desire the Court wishes to encourage. If the Board of Education had genuinely wished to establish a unitary school system, it had available to it the superior resources and assistance to do so.

The realistic and effective approach of the defendants to the McGavock School area was incorporated as an amendment to the HEW plan, despite the fact that it

requires more transportation, over longer distances, than was required by the original HEW plan. The Court feels that where administrative goals can be satisfied without hampering the constitutional objectives to be accomplished, such goals should control.

Action of the Court

The Court hereby adopts the HEW Plan A as to elementary schools. This plan utilizes all of the methods previously enumerated. The map showing the geographic zones is on file with the clerk. This map also reflects the zoning, pairing and clustering to be employed. The charts appearing at pages 34 through 41 of the HEW plan, as filed with the clerk, are adopted as a part of said plan and will be followed in the implementation thereof.

Simultaneously with this Memorandum Opinion, the Court has filed maps showing the geographic zones of the junior and senior high schools. Likewise, charts are filed titled Table 1, Senior High Schools, and Table 2, Junior High Schools. These charts will be followed in the implementation of the plan.

In the implementation of the plans, the transparent maps can be placed as overlays on the student locator map. Thus the geographic boundaries of the zones become clear. In effect, the Court is providing the defendant school board a map overlay for each of the grade divisions, namely the elementary schools, the junior high schools, and the senior high schools. These overlays indicate grade and school groupings, where such are made, and approximate areas for attendance. Accompanying tables show the approximate numbers of pupils involved. The responsibility for determining the precise boundary lines is placed upon the defendant Board of Education. A written description of such boundaries, together with tables showing approximate numbers of pupils by race in

each school, shall be filed with this Court by August 1, 1971. The defendant Board of Education may make minor alterations in boundaries provided such alterations do not lessen the degree of desegregation in the plan ordered by the Court.

The Court is aware that the cost of implementing any plan is a major concern. Much proof was introduced as to the financial impact of any plan which requires transportation. Since the defendants have consistently transported large numbers of students to promote segregation, some adjustment must be made to reverse this unconstitutional practice. Practical solutions are available, such as the multiple use of buses, staggered hours for school opening, and staggered hours for individual grades.

> "We do not read **Swann** and **Davis** as requiring the District Court to order the Board to provide extensive transportation of pupils to schools all over the city, regardless of distances involved, in order to establish a fixed ratio in each school." **Northcross v. Board of Education**, Civil Nos. 20,533, 20,539 (6th Cir., filed June 7, 1971).

This order does not contemplate cross-transportation of pupils within a grade level in implementation of this order. If such crossing occurs, the Board may make minor adjustments in zones or may make application to the Court for reconsideration of the zones. It is further contemplated that the transportation routes in the plan implemented by this order permit uninterrupted transportation of children from home pickup points to and from the school attended. This is not to preclude the Board in the exercise of administrative discretion and consideration of transportation economies, from establishing transfer routing and collection points.

The Court is aware that some "all-white" schools remain in the outlying areas of the county. However, based

upon practical considerations, common sense and judgment dictate that they should not be integrated. Integration of those particular schools would not be feasible, both from a distance and a cost standpoint. However, to prevent the use of these schools as an avenue of resegregation, certain restrictions on their use will be hereinafter set forth.

Special Provisions

Majority to Minority Transfer Policy

After this plan is implemented, there will be no schools which have a majority of black students. Because of population changes or other circumstances, however, this situation might occur in the future. Therefore, the following policy shall be a part of the plan to be implemented.

Whenever there shall exist schools containing a majority of black students, this school board shall permit a student (black or white) attending a school in which race is the majority to choose to attend the closest school where his race is a minority. The Board of Education will provide all such transferring students free transportation and will make space available in the school to which he desires to move. The Board will notify all students of the availability of such transfers.

Faculty Integration

On July 16, 1970, Judge Miller in this case stated:

> "It is well recognized that faculty and staff integration is 'an important aspect of the basic task of achieving a public school system wholly free from racial discrimination.' United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969); **see** Bradley v. School Board of City of Richmond, 382 U.S. 103, 86 S.Ct. 224,

15 L.Ed.2d 187 (1965). In order to implement this mandate, the Court concludes that in the instant case faculties must be fully integrated so that the ratio of black and white faculty members of each school shall be approximately the same as the ratio of black to white teachers in the system as a whole. Robinson v. Shelby County Board of Education, *supra*; Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4th Cir. 1969); Stanley v. Darlington County School District and Whittenberg v. Greenville County School District, 424 F.2d 195 (4th Cir. 1970); Pate v. Dade County School Board, 307 F. Supp. 1288 (S.D. Fla. 1969); *contra*, Deal v. Cincinnati Board of Education, *supra*. **But see** Goss v. Board of Education of the City of Knoxville, 406 F.2d 1183 (6th Cir. 1969)." **Kelley v. Metropolitan County Board of Education,** *supra*, at 991.

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"It is the conclusion of the Court that the present policy of faculty desegregation applied by defendant is constitutionally inadequate. That policy must be altered to comply with the standards set forth above. A similar policy also must be applied to all other personnel employed by defendant school board." **Kelley v. Metropolitan County Board of Education,** *supra*, at 992.

The court-required ratio for teachers in each school was fixed at that time to be 80 per cent white to 20 per cent black. Approximately 94 schools are not currently operating at this ratio. In most schools, this ratio could be accomplished by moving one or two teachers. Upon the implementation of the plan presently adopted by the Court, there should be no difficulty in meeting the court order of 1970. Therefore, the defendants are required to effect said ratios for the next school year beginning on or about September 1, 1971.

The school board shall immediately announce and implement the following policies:

1. The principals, teachers, teacher-aides, and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. The school board shall, to the extent necessary to carry out this desegregation plan, direct members of its staff to accept new assignments as a condition to continued employment.

2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

3. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school system which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school system. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until such displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria

shall be available for public inspection and shall be retained by the school board. The school board also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general, depending upon the subject matter involved, five years is such a reasonable period.

Construction, Renovation and Location of Schools

On July 16, 1970, the United States District Court stated:

"The constitutional requirement of desegregation also finds application in the area of construction, renovation, and location of schools. School boards are required consciously to plan school construction and site location so as to prevent the reinforcement or recurrence of a dual educational system. **See, e.g.,** Felder v. Harnett County Board of Education, 409 F.2d 1070 (4th Cir. 1969); Swann v. Charlotte-Mecklenburg Board of Education, 306 F. Supp. 1291, 1299 (W.D. N.C. 1969); Pate v. Dade County School Board, 307 F. Supp. 1288 (S.D. Fla. 1969). Courts may properly restrain construction and other changes in the location or capacity of school properties until a show-

ing is made that such changes will promote rather than frustrate the establishment of a unitary school system. This Court in the past has stated that school boards may be enjoined from planning, locating or constructing new schools or additions to existing schools in such manner as to conform to racial residential patterns or to encourage or support the growth of racial segregation in residential patterns. Such operations, rather, are to be conducted 'in such manner as to affirmatively promote and provide for both the present and future an equitable distribution of racial elements in the population of each School System.' Sloan v. Tenth School District of Wilson County, Civ. No. 3107 (M.D. Tenn., Oct. 16, 1969).

"Looking to the facts of the instant case, it becomes apparent that defendant's decisions on the site selection and construction of its newest schools were not designed to promote desegregation. Since 1963, defendant has built four new elementary schools (Dodson, Granberry, Lake View, and Paragon Mills), eight new junior high schools (Apollo, Bass, Ewing Park, McMurray, John T. Moore, Neely's Bend, Rose Park, and Wright), and one new high school (Dupont). Of these 13 schools, Rose Park, with an enrollment of 527 black students and 11 white students, is virtually all-Negro. The remaining twelve schools, however, are, on the average, 97% white, with some having a black enrollment as high as 10%. Three elementary schools (Cora Howe, Fall-Hamilton, and H. G. Hill) and one high school (McGavock) are currently under construction. Enrollment estimates indicate that all of these schools will be predominately white.

"Seven elementary schools, two high schools, and one school for the physically handicapped are cur-

rently in the planning stage. The two high schools are being planned for predominantly black student bodies. Five of the seven elementary schools are to be constructed in virtually all-white residential areas, while the remaining two are projected for location in all-black or predominantly black residential areas. Thus, from the foregoing, it is apparent to the Court that defendant must consider making substantial alterations in its school construction policies in order to comply with constitutional requirements.

"The Court is of the opinion that the following course of action must be taken by defendant. First, those new schools on which construction work was actually in progress as of November 6, 1969,[13] may be completed. Though this action may not produce an ideal result in light of the goal of integration, it will prevent unnecessary economic waste. Also, since, these new schools will be subject to the same zoning policies prescribed above, their segregative influences should be lessened. Second, in instances where actual construction had not begun as of November 6, 1969, defendant must revise its plans where necessary in relation to these proposed schools so as to find a location that will maximize student integration. Finally, in the future all construction plans as well as plans for closure of old schools must be governed by the principles stated herein. The purpose of the Court in making such a requirement is to insure that such plans will serve the purpose of establishing a unitary school system. **See** Sloan v. Tenth School District of Wilson County, *supra*." (Footnote omitted.) **Kelley**, *supra*, at 992-93.

"[13] This is the date of the Temporary Restraining Order issued by this Court to enjoin defendant from further construction, expansion, or closure of schools pending the outcome of this suit."

New Construction. The Board has proposed for approval the erection of two comprehensive senior high schools, one in the Joelton school area, and the other in the Goodlettsville area.

In connection with future planning, the Board employed a team of consultants to evaluate the existing school structures and to project the location of new structures. Prior to the submission of these recommendations, the Court requested, and two administrators of the Board located on a map, the ideal locations for comprehensive schools. When the team of consultants later made its report, their projections generally agreed with those of the school administrators. They found that new comprehensive schools should be located in the general area of the proposed inner-city expressway loop known generally as "Briley Parkway." The reason for this agreement is obvious when the pupil locator map is examined. Briley Parkway is generally the divider between the inner-city pupils and the outer-county pupils. It is roughly the halfway division. By the establishment of schools in this area, the integration of schools would be effected naturally and thereby minimize transportation.

Therefore, the Court finds that the erection of a comprehensive school in the Joelton area, with geographic zones drawn in accordance with the testimony in court, will maximize student integration. Upon submission of proper zoning and pupil assignment, this construction will be approved.

The proposed Goodlettsville school, a comprehensive high school, is located in an all-white community and is not located near the dividing line between inner-city population and outer-county population. By referring to the pupil locator map, it clearly appears that the erection of this school would tend to promote segregation. Thus the erection of this school in its proposed location is hereby

enjoined. If the Board desires to establish another comprehensive high school, subsequent court approval may be obtained by submitting an appropriate location and proper geographic zones, which will achieve and perpetuate integration.

Another proposal is the erection of a school for the physically handicapped at 2500 Fairfax Avenue. This facility is to be erected near Vanderbilt University. The availability of professional services from Vanderbilt University and Vanderbilt Hospital is stressed. The plaintiffs assert that said project should be located in a "halfway" position between Vanderbilt University, Meharry Medical College, and Fisk University.

The Court feels that the facility will have little, if any, effect on achieving a unitary school system. This Court will not substitute its judgment for that of the Board, and the Board's proposal is approved.

Additions and Renovations. An application has been made for permission to acquire additional property for Hillsboro School so as to transform Hillsboro into a comprehensive high school. This application is denied for the same reasons that the Goodlettsville school was not approved.

Portable classrooms, referred to generally as "portables," have been used by the Board to house students in schools which were all-white or had received only token integration when there were vacant rooms in predominantly black schools. In effect, portables have been used to maintain segregation. In the future, portables shall be used only to achieve integration and the Board is hereby so enjoined.

In the plan adopted by the Court, certain schools in the outlying areas of the school district remain virtually all white. By reason of the past conduct of the Board the

Court hereby sets forth the following restrictions to prevent these schools from becoming vehicles of resegregation. It is ordered that the schools, which have less than 15 per cent black pupils after the implementation of the plan, shall not be enlarged either by construction or by portables, and shall not be renovated without prior court approval. Furthermore, no additional schools shall be erected without prior court approval.

By making the above restrictions, this Court does not imply that it will make "year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." **Swann**, *supra*, at 575.

The parties will draw and submit an order to the Court within fifteen (15) days. However, without said order this Memorandum Opinion is self-executing and must be implemented for the school year beginning on or about September 1, 1971. The Court will retain jurisdiction of this case. No stay will be granted by this Court. **Swann**, *supra*, at 570; **United States v. Board of Public Instruction**, 395 F.2d 66 (5th Cir. 1968); **Brewer v. School Board**, 397 F.2d 37 (4th Cir. 1968).

L. CLURE MORTON
United States District Judge

Table 4

COMPOSITE BUILDING INFORMATION FORM
ELEMENTARY SCHOOLS

Date.....

Name of School	Grades	CAP.	TRANS.	Students W	N	T	%B	Comments
McKissack	5-6	990	516	482	373	955	39	
McCann	1-4	690	108	417	273	690	39	Contiguous
Cockrill	1-4	510	0	241	36	277	36	Contiguous
Charlotte Park	1-4	870	164	556	306	862	36	306-b from A
Richland	1-4	510	136	241	136	377	36	136-8 from B
Park Avenue	5-6	420	272	277	111	388	29	
Sylvan Park	1-4	660	164	340	157	497	32	Contiguous
Vaught	1-4	360	114	212	114	326	35	114-b from C
Head	5-6	1080	350	329	211	540	39	
Ransom	1-4	390	202	252	154	406	38	153 b from D
Eakin	1-4	570	130	238	145	383	38	Contiguous
Woodmont	1-4	360	205	204	128	332	38	128 b from E

Table 4

COMPOSITE BUILDING INFORMATION FORM
ELEMENTARY SCHOOLS

Date.....

Name of School	Grades	CAP.	TRANS.	Students W	N	T	%B	Comments
Waverly-Belmont	5-6	450	294	310	160	470	34	
Stokes	1-4	390	67	157	91	248	37	Contiguous
Burton	1-4	540	316	234	137	371	37	18w-137b from H
J. Green	1-4	390	128	251	90	341	34	16w-90-b from G
Percy Priest	1-6	660	519	471	188	659	28	12-w-188-b from F
Robertson Academy	5-6	210	126	138	55	193	28	
Glendale	1-4	420	246	263	99	362	27	
C. Lawrence	6	1020	283	308	160	468	34	
Murrell	5	510	272	279	161	440	37	
Fall-Hamilton	1-4	480	86	245	168	461	36	Contiguous
Berry	1-4	450	114	207	115	322	36	1-w-113b from L
Woodbine	1-4	510	144	248	143	391	36	1-w-143-b from J
Turner	1-4	630	139	247	129	376	34	8w-129b from I
Glencliff	1-4	480	133	254	129	383	34	4-w-128b from K

Table 4

COMPOSITE BUILDING INFORMATION FORM
ELEMENTARY SCHOOLS

Date.....

Name of School	Grades	CAP.	TRANS.	Students W	N	T	%B	Comments
Napier	6	780	289	289	183	472	39	
Johnson	5	720	333	328	192	520	37	
Allen	1-4	540	585	319	196	515	38	Contiguous
Glenview	1-4	630	241	371	235	606	39	6w-235b from M
Glengarry	1-4	360	146	211	140	351	39	140-b from N
Whitsitt	1-4	600	390	390	244	634	38	64-w-244b from O
Early	5-6	840	367	370	188	558	34	N. C.
H. G. Hill	1-4	600	401	304	199	503	39	N. C.
Brookmeade	1-4	570	371	335	198	533	37	N. C.
Ford Green	5-6	1050	437	428	259	687	38	N. C.
Parmer	1-4	540	316	223	154	377	40	N. C.
West Meade	1-3	510	367	294	180	474	38	N. C.
Binkley	1-4	510	367	305	184	489	38	N. C.
P Mills								

Table 4

COMPOSITE BUILDING INFORMATION FORM
ELEMENTARY SCHOOLS

Date.....

Name of School	Grades	CAP.	TRANS.	Students W	N	T	%B	Comments
Wharton	5-6	1590	426	429	179	608	29	N. C.
Binkley	1-4	840	248	486	224	710	32	N. C.
Crieve Hall	1-4	540	125	275	125	400	31	N. C.
Buena Vista	5-6	660	415	448	184	632	29	N. C.
McGavock	1-4	600	358	395	193	588	33	N. C.
Hickman	1-4	660	217	444	182	626	29	N. C.
Fehr	5-6	360	211	236	92	328	28	N. C.
Stanford	1-4	630	358	391	184	575	32	N. C.
Kirkpatrick	5-6	540	20	305	126	431	30	
Warner	1-4	1020	0	663	302	965	31	
Caldwell	5-6	1110	375	390	219	609	36	N. C.
Lockeland	1-4	630	252	397	238	635	38	238-b-14-w from
Rosebank	1-4	600	200	306	180	486	38	N. C.

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Table 4

COMPOSITE BUILDING INFORMATION FORM
ELEMENTARY SCHOOLS

Date.....

Name of School	Grades	CAP.	TRANS.	Students W	N	T	%B	Comments
Ross	K-6	360	13	195	89	284	31	No change
Howe	K-6	720	1	474	127	601	21	No change
Dan Mills	5-6	540	191	325	115	440	26	
Oakwood	3-4	660	51	400	116	516	22	
Inglewood	1-2	720	191	408	147	555	27	
Cotton	K-6	420	0	315	114	429	26	
Glenn	5-6	630	324	411	238	649	37	
Baxter	3-4	690	475	434	245	679	36	
Tom Joy	1-2	720	375	408	240	648	37	
Haynes	5-6	900	280	293	173	466	37	
Shwab	1-4	480	115	359	133	492	27	Contiguous
Gra-Mar	1-4	420	188	265	110	375	29	(Illegible)

Table 4

COMPOSITE BUILDING INFORMATION FORM
ELEMENTARY SCHOOLS

Date.....

Name of School	Grades	CAP.	TRANS.	Students W	N	T	%B	Comments
Kings Lane	5-6	660	409	405	229	634	36	
Brick Church	1-4	690	302	417	296	713	41	Contiguous
A. Green	1-4	300	112	187	109	296	37	106-b-7-w from W
Bellshire	1-4	570	132	221	129	350	37	128-b-2-w from X
Bordeaux	1-6	690	153	494	186	680	27	No Change
Jordonia	4-6	240	160	155	46	201	23	
Wade	1-3	240	155	171	41	212	19	
*Chadwell	1-6	480	212	405	135	540	25	* These schools include
*Stratton	1-6	780	212	694	129	823	16	former enrollment from Jones in grades 1-4 divided equally. Two-1 portables will be needed at each school.

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Table 4

COMPOSITE BUILDING INFORMATION FORM
ELEMENTARY SCHOOLS

Date.....

Name of School	Grades	CAP.	TRANS.	Students W	N	T	%B	Comments
Harpeth Valley	K-6	600	460	555	15	570	3	
Granberry	K-6	600	402	569	37	606	6	
Tusculum	1-6	630	0	601	19	620	3	
Cole	1-6	780	273	693	13	706	2	
Haywood	1-6	600	84	477	64	541	11	
Paragon Mills	1-6	930	366	851	1	852	.1	
Una	K-6	630	486	623	20	643	3	
Lakeview	1-6	840	258	778	24	802	2	
Dodson	K-6	690	386	695	53	748	7	
Hermitage	1-6	810	0	826	0	826	0	
A. Jackson	K-6	570	161	359	72	431	16	
Pennington	K-6	600	171	586	4	590	.6	
Neely 's Bend	1-6	480	300	404	39	443	8	
Donelson	K-6	570	154	427	3	430	.6	
DuPont	1-6	780	310	634	19	653	3	

Table 4

COMPOSITE BUILDING INFORMATION FORM
ELEMENTARY SCHOOLS

Date.....

Name of School	Grades	CAP.	TRANS.	Students W	N	T	%B	Comments
Amqui	1-6	680	100	673	3	676	.4	
Old Center	K-6	540	228	443	1	434	.2	
Gateway	1-6	300	202	508	2	510	.4	
Goodlettsville	K-6	540	221	520	30	550	5	
Union Hill	1-6	210	145	190	0	190	0	
Joelton	1-6	390	346	398	0	398	0	
Nanny	1-6	330	150	189	0	189	0	

Social (Illegible) Schools Unchanged
Total Transported 22,065

(Illegible)
(Illegible)
(Illegible)
Pearl Discontinued
Penard Discontinued
Slemons Discontinued
Elliott Discontinued
Jones Discontinued

APPENDIX "B"

Nos. 71-1778-79

United States Court of Appeals
for the Sixth Circuit

Robert W. Kelley, et al., Henry C. Maxwell, Jr., et al.,
Plaintiffs-Appellees,

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman, et al.,
Defendants-Appellants.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed May 30, 1972

Before: EDWARDS, CELEBREZZE and McCREE, Circuit Judges

EDWARDS, Circuit Judge. In this case we do not write on a clean slate. What follows describes an incredibly lengthy record and settled law pertaining to segregated schools. We start with this latter, as recited in the United States Constitution and in three historic, unanimous decisions of the United States Supreme Court—the last dated 1971.

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

[A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin v. County School Board*, 377 U. S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss v. Board of Education*, 373 U. S. 683, 689. See *Calhoun v. Latimer*, 377 U. S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*. *Green v. County School Board of Kent County*, 391 U.S. 430, 438-39 (1968).

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

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Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971).

After 17 years of continuous litigation the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, appeals from a final order of the United States District Court for the Middle District of Tennessee requiring the School Board to take the necessary steps to end the racially separated school systems which it had previously been found to be operating. This order was a direct result of an order of this court approving the District Court's findings of violations of equal protection and vacating a stay of proceedings. In it we had noted:

> [T]he instant case is growing hoary with age. It is actually a consolidation of two cases. The first case, Kelley v. Board of Education of the City of Nashville, Civ. A. No. 2094, was filed in September of 1955; and the second case, Maxwell v. County Board of Education of Davidson County, Civ. A. No. 2956, was filed in September of 1960. A whole generation of school children has gone through the complete school system of Metropolitan Nashville in the intervening years under circumstances now determined to have been violative of their conditional rights. A second generation of school children is now attending school under similar circumstances—and the remedy is not in sight. *Kelley v. Metropolitan Board of Education of Nashville, Tennessee*, 436 F.2d 856, 858 (6th Cir. 1970).

The order of the District Judge is the first comprehensive and potentially effective desegregation order ever entered in this litigation. The District Judge tells us that now the remedy is at least in sight.

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THE APPELLATE ISSUES

On appeal defendants contend 1) that the District Court had no jurisdiction to hear and determine this case because of failure to comply with Rule 23 of the Federal Rules of Civil Procedure and because of changes in the status of the original party plaintiffs since the commencement of these suits; 2) that the District Court's order is invalid because it requires integration of schools according to a fixed racial ratio, in violation of the rules set out in *Swann v. Charlotte-Mecklenburg Board of Education, supra* at 23, 24; and 3) that the plan ordered into effect should be reconsidered because of what the defendant School Board claims to be adverse effects on the health and safety of school children involved.

Plaintiffs as cross-appellants claim 1) that the District Court erred in adopting the Department of Health, Education and Welfare plan when the plan proposed by plaintiffs would have achieved a greater degree of integration; and 2) that the HEW plan should have been rejected because it places the burden of desegregation disproportionately upon Negro children.

HISTORY OF THE NASHVILLE-DAVIDSON COUNTY CASE

The history of school desegregation from *Brown v. Board of Education, supra,* to date can be traced in this case in the proceedings in the District Court, in this Court, and in the United States Supreme Court: *Kelley v. Board of Education of City of Nashville,* 139 F.Supp. 578 (M.D. Tenn. 1956) (Dissolution of three-judge court); *Kelly v. Board of Education of City of Nashville,* 159 F.Supp. 272 (M.D. Tenn. 1958) (Disapproval of integration plan and grant to Board of additional time to file a new plan); *Kel-*

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ley v. Board of Education of City of Nashville, 8 R.R.L.R. 651 (M.D. Tenn. 1958) (Approval of 12-year plan); *Kelley v. Board of Education of City of Nashville*, 270 F.2d 209 (6th Cir. 1959) (Upholding District Court order); *Kelley v. Board of Education of City of Nashville*, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959) (Denial of certiorari); *Maxwell v. County Board of Education of Davidson County*, 203 F.Supp. 768 (M.D. Tenn. 1960); *Maxwell v. County Board of Education of Davidson County*, 301 F.2d 828 (6th Cir. 1962), *reversed in part and remanded sub nom, Goss v. Board of Education of Knoxville*, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963); *Kelley v. Board of Education of Nashville and Davidson County*, 293 F. Supp. 485 (M.D. Tenn. 1968) (Further proceedings in a consolidation of *Maxwell, supra*, and *Kelly, supra*); *Kelley v. Metropolitan County Board of Education*, 317 F.Supp. 980 (M.D. Tenn. 1970); *Kelley v. Metropolitan Board of Education of Nashville, Tennessee*, 436 F.2d 856 (6th Cir. 1970) (Memorandum opinion (filed June 28, 1971); Judgment (filed July 15, 1971)).

This case began in 1955 on the heels of the United States Supreme Court's decision in *Brown v. Board of Education, supra*, holding that "separate educational facilities are inherently unequal," *supra* at 495. Plaintiffs in a class action sought invalidation of the Tennessee school laws, T.C.A., § 49-3701, *et seq.*, which in specific terms required segregation of school pupils by race. (See Appendix A) In 1956 a three-judge federal court which had been convened to pass on the constitutionality of the state statute was dissolved when the defendant Board of Education conceded the unconstitutionality of the state statute by which it had previously been governed. *Kelley v. Board of Education of City of Nashville*, 139 F.Supp. 578 (M.D. Tenn. 1956). The case was then remanded to the United States District Court for the Middle District of Tennessee. The District Judge determined that the case was an

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appropriate class action under Rule 23 of the Federal Rules of Civil Procedure (Record, Min. Book 19 at 683). He ordered the defendant School Board to prepare and present a plan for desegregation of the Nashville schools.

Before judgment was entered, the State of Tennessee in January 1957 adopted a Parental Preference Law, TCA § 49-3704, Pub. Acts 1957, cc 9-13, 2 RACE REL. L. REP. 215 (1957). (See Appendix A) This statute provided for separate white, black, and mixed schools, with attendance to be determined by parental preference. The District Court in September of 1957 held this statute to be unconstitutional on its face. 2 RACE REL. L. REP. 970 (1957).

The defendant School Board thereupon (and nonetheless) presented a parental preference plan for white, black, and mixed schools substantially the same as that called for by the unconstitutional state law.

In February of 1958 the District Court held the School Board plan to be unconstitutional.

Later in the same year a grade-a-year desegregation plan was submitted by defendant School Board, approved by the District Court and the Court of Appeals, with certiorari denied by the United States Supreme Court.

In 1960 a suit was filed to desegregate the Davidson County schools. *Maxwell v. County Board of Education of Davidson County, supra.* It was brought on behalf of Negro children alleged to be denied their constitutional rights to equal education in the county school system. Again the suit was brought as a class action and recognized as such by the District Court under Rule 23, FED. R. CIV. P. (Record, Min. Book 24 at 114.) The Davidson County school Board proposed a free transfer plan and it was approved by the District Court. On appeal Maxwell's free transfer plan was invalidated by the United States Supreme Court, *sub nom., Goss v. Board of Education of Knoxville,* 373 U.S. 683 (1963).

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In 1963 the school systems of Nashville and Davidson County were then consolidated as part of a general consolidation of the City of Nashville and County of Davidson into one metropolitan government. Petitions for further relief, including an order to desegregate the Nashville-Davidson County schools and to enjoin further school construction pending such an order, were filed in the consolidated case, with additional plaintiffs intervening.

In 1968 the United States Supreme Court took further note of how the *Brown II* phrase "deliberate speed" was being employed to delay rather than to implement school desegregation.

For purposes of reemphasis, we again quote the unanimous opinion:

> [A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin v. County School Board,* 377 U.S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss v. Board of Education,* 373 U.S. 683, 689. See *Calhoun v. Latimer,* 377 U.S. 263. *The burden on a shool board today is to come forward with a plan that promises realistically to work, and promises realistically to work* NOW. *Green v. County School Board of Kent County,* 391 U.S. 430, 438-39 (1968). (Emphasis added.)

On the heels of these deisions plaintiffs sought relief consistent with them and lengthy hearings followed. In 1970 the District Judge entered findings of fact which were subsequently reviewed and given effect by this court. *Kelley v. Metropolitan County Board of Education of Nashville, Tennessee,* 436 F.2d 856 (1970). In its opinion this court said:

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It would be well for those in authority in Nashville and Davidson County to read the able opinion [District Court opinon entered July 16, 1970] whch we now revitalize by our present order. The emphasis in the quotation which follows is that of this court:

> "[I]t is the Court's view that in the area of school zoning, school boards will fulfill their affirmative duty to establish a unitary school system only if attendance zone lines are drawn in such way as to maximize pupil integration. In drawing such lines, the defendant school board may properly consider in the total equation such factors as capacities and locations of schools, physical boundaries, transportation problems, and cost; however, none of these considerations can supercede the importance of the primary goal of maximizing integration.
>
> "In looking to the facts of this case, the Court finds that many of the elementary and secondary school zone lines in the Nashville and Davidson County School System have not been drawn so as to minimize integration. *With the exception of zone lines drawn for new schools, the zone lines currently in existence were drawn prior to Brown v. Board of Education with the aim of maintaining segregation.* Though there has been some black population migration to formerly white areas, in large part *these zone lines continue to serve quite well the segregative purpose for which they were originally established.* The truth of this statement is made manifest when one examines the racial make-up of the pupil population in areas containing several contiguous attendance zones. In East Nashville, for example, there is a cluster of five elementary schools having contiguous attendance zones. Of these five schools, white pupils are in the great majority in four

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schools, Baxter, Dalewood, Rosebank, and Bailey, while black students are in the majority in one of the schools, Inglewood. As a reference to the zone map will indicate, Inglewood is completely surrounded by the four predominantly white schools, and the Inglewood zone is drawn to enclose most of the black population living in the five school area. Defendants argue that they are applying the 'neighborhood' concept in the drawing of elementary school zone lines. *If such a concept is indeed being applied in this five school area, it appears to the Court that it is being applied solely to perpetuate segregation. Defendants contend that one of the prime advantages of neighborhood 'schools' is that they allow pupils to walk to and from school. If this is true, it is difficult to see why black pupils who live closer to Baxter or Bailey schools, for instance, are required to walk the greater distance to attend Inglewood school.*

"The same pattern is repeated in a seven school area in south and west Nashville. In this situation, the attendance zones for Ransom and Eakin schools are contiguous with the attendance zones for Ford, Greene, Head, Carter Lawrence, Murrel and Clemons schools. The former two schools are almost completely white, while the latter five schools are almost totally black.[7] Once again it

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[7] See Map No. 2 in Appendix and note the following figures* on the enrollment of these schools:

	W	B	% B
Ford Greene	0	887	100
Head	0	791	100
Carter Lawrence	0	516	100
Murrel	0	328	100
Clemons	51	519	90
Ransom	355	2	1
Eakin	487	5	1

* Based on plaintiff's exhibit No. 3.

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appears that the zone lines as drawn insure that white neighborhoods will have white schools and black neighborhoods will have black schools. *As the above two illustrations make clear, by maintaining the old dual school zones, defendant has encouraged continued segregation rather than significant integration in the elementary schools.*

"Turning to junior high school zones, the Court finds much the same situation as in the elementary schools. Though the 'neighborhood' concept is not applied in secondary school zoning, junior high school zones are drawn so that each school serves a particular residential area or 'service area' as it is sometimes referred to by defendant. These service areas cover a broader geographic area than a single neighborhood, for several elementary schools within their respective neighborhood zones feed graduating students into the junior high school within whose zone they lie. This process is generally described in terms of a 'feeder pattern.' Once again, a look at the existing zone lines convinces the Court that the junior high school attendance zones and the 'feeder patterns' which graduate elementary students into the junior high schools are structured so as to foster for the most part continued segregation or at best only token integration. *It is apparent that the zone lines as presently drawn are designed to provide racially identifiable 'black' schools for black residential areas and 'white' schools for white residential areas.* For example, looking at a cluster of six contiguous junior high school zones, the Court finds that Bass, West End, and Moore Junior high schools are all predominantly white schools with their attendance zones being drawn so as to correspond significantly with white

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residential areas. On the other hand, Washington, Rose Park and Waverly-Belmont are all racially identifiable as black schools and their attendance zones have been drawn in a manner effectively to prevent a significant number of black pupils from attending school outside of the black residential area.[8]

"*Finally, looking to the high school zones, there is similar evidence of continued duality in the school system.* For example, of five contiguous high school zones, three of the schools, Cohn, Hillsboro and Central, are racially identifiable as white schools. Their attendance zone lines form the boundary line between the predominantly white residential areas in south and west Nashville and the black residential areas to the north and east. These black areas are served by Cameron and Pearl high schools.[9]

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[8] *See* Map No. 3 in Appendix and note the following figures:*

	W	B	% B
Bass	777	12	2
West End	578	40	6
Moore	999	85	8
Washington	0	1,347	100
Rose Park	11	527	98
Waverly-Belmont	26	260	91

* Based on plaintiffs exhibit No. 3.

[9] *See* Map No. 4 in Appendix and note the following figures:

	W	B	% B
Cohn	960	45	1
Hillsboro	1,223	15	1
Central	899	203	18
Pearl	1	1,308	100
Cameron	0	1,212	100

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"In connection with the segregative effect of present school zoning, it is interesting to note that while portable classrooms are in limited use in predominantly Negro schools, approximately 117 portables are in use in racially identifiable white schools. These predominantly Negro schools, on the basis of their rated maximum capacities, have approximately 5,400 vacancies, yet the white schools, in zones tailored to white residential sections, are overcrowded. It would seem that rezoning could serve the dual purpose of alleviating this overcrowding and, at the same time, promoting the goal of integration.

"It is the Court's conclusion that defendant's current policy of attendance zoning does not facilitate rapid conversion from a dual to a unitary school system. As is evident from the foregoing discussion, the zone lines as they presently exist foster continued segregation in many instances.[10] *Corresponding as they do to racial residential patterns, it is difficult to envision any other result. Historic zone lines which purposely promote segregation must be altered. In making such alterations defendant board should take those steps 'which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.'* Green v. County School Board of New Kent County, *supra* [391 U.S. 430] at 442 [88 S.Ct. 1689, 20 L.Ed.2d 716].

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[10] Of the 139 regular schools in the system in 1969-70, 88 had less than 10% black enrollment, 22 had 10% to 40% black enrolling (with the total enrollment of these latter 22 schools constituting only 16% of the entire metropolitan school enrollment), and finally 29 schools had more than 40% black enrollment. A clear racial pattern is present."

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Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, supra at 859-61. (Footnotes in quotation.)

We then remanded the case with instructions:

> We believe that "the danger of denying justice by delay" in this case is as clear as it was in Alexander, *supra*; Green v. County Board, *supra*, and Carter, *supra*.
>
> We now vacate the stay of August 25, 1970, with the intention of leaving in full effect and operation the judgment of the District Court of August 13, 1970. The present District Judge should proceed immediately to hold the necessary hearings upon objections to the Board of Education plan and thereafter to approve or modify same as the record which is developed appears to require, and thereupon enter an order of implementation. The time schedule for consideration and implementation of this order should, of course, meet the "maximum" standard set forth by the Supreme Court in the second *Carter* case (Carter v. West Feliciana Parish School Board, 396 U.S. 290, 293, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970)). The District Court may, of course, require reports (including a pupil locator map) and recommendations (including those of expert witnesses and the Department of Health, Education and Welfare) and consider them in its order of implementation. Id. at 862.

Acting within the terms of his sworn obligation a new District Judge proceeded to implement this court's instructions.

While he was thus engaged, the United States Supreme Court decided the third history making case pertaining to school segregation (*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)). The opinion for

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a unanimous Supreme Court was written by Chief Justice Burger. In recital of the facts and conclusions of law, it parallels and controls our decision of this case.

> We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown v. Board of Education*, 347 U. S. 483 (1954) (*Brown I*).
>
> This case and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown v. Board of Education* was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. *Swann v. Charlotte-Mecklenburg Board of Education*, *supra* at 5-6. (Footnote omitted.)

These words apply exactly to the fundamental problems in the instant case also. The District Court order here under review is designed to "eliminate racially separate public schools established and maintained by state action." Tennessee is, as we have noted above, a state "having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." (See Appendix A.) We here consider a District Court order designed to "implement . . . Brown I and . . . to eliminate dual systems and establish unitary systems at once."

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> The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals. *Swann v. Charlotte-Mecklenburg Board of Education, supra* at 7.

This paragraph applies to the facts of the instant case without change of a single word.

Chief Justice Burger then turned to the question of appropriate remedial measures to eliminate state imposed segregation:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U. S., at 437-438.
>
> If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers

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to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

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In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system. *Swann v. Charlotte-Mecklenburg Board of Education, supra* at 15-16.

The default of school authorities referred to by Chief Justice Burger is equally illustrated by the history of our present case.

With this history and these principles before us, a tabular comparison of the fact situations and District Court plans presented in the *Swann* and *Kelley* cases is appropriate:

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	Swann v. Bd. Ed.	Kelley v. Bd. Ed.
Date of original complaints	1965	1955
No. of schools (before plan)	107 (1968-69)	139 (1970-71)
No. of schools (after plan)	107	133 (1971-72)
Total enrollment	84,000 (approx.)	94,170 (1970-71)
Per cent white students	71%	75% (75.12%)
Per cent black students	29%	25% (24.63%)
Walking distance (after plan)	1½ miles	1½ miles
No. students bused prior to plan	23,600	33,485
No. white students bused prior to plan	Exact figures not available, but it is clear that a large majority	30,000
No. black students bused prior to plan	of students bused were white.	3,500 (approx.)
Extent of segregation prior to plan	In 1969 ⅔ of the black students were then attending schools that were either totally or 99% black.	In 1969 81% of all white students were attending schools that were over 90% white, while 62% of all black students were attending school that were over 90% black.

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	Swann v. Bd. Ed.	Kelley v. Bd. Ed.
Net increase in No. of students bused as a result of court adopted plan	13,300	15,000 (approx.)
No. of additional buses required	138 54-passenger buses	82 84-passenger buses
No. of buses obtained to carry out plan	Court opinions do not contain this information	None
Ratio of white to black student population employed by court approved plan as guide	71%-29%	75%-25%
Per cent of schools desegregated by plan within guide related ratios	100% of elementary* schools would have black student population of 9%-38%.	77% of elementary schools would have a black student population of 16%-41%; 22 outlying schools would have a black student population of 0%-22%.
One race schools remaining under plan due to travel distance	Apparently none	5

* Junior and Senior High School desegregation under the *Swann* plan was likewise considerably closer to ideal unitary school standards than the plan approved by the District Court in this case.

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The general principles of *Swann* were, of course, enunciated by the Supreme Court for guidance of District Courts and Courts of Appeals in *all* school segregation cases. In view of the close factual resemblances between this case and *Swann*, these principles, however, apply here a fortiori.

THE REMEDIAL ORDER OF THE DISTRICT COURT

The nature of the problem facing the District Court many years after *Brown v. Board of Education*, 347 U.S. 483 (1954), is vividly portrayed in the statistics and the table set forth below.[1]

Racial Composition for the Three Years Preceding Hearings on Motion for Further Relief

1967-68—85% of the white students attended schools that were over 90% white.

63% of the black students attended schools that were over 90% black.

1968-69—80% of the white students attended schools that were over 90% white.

61% of the black students attended schools that were over 90% black.

1969-70—81% of the white students attended school that were over 90% white.

62% of the black students attended school that were over 90% black.

These figures show that during the three-year period nearly two-thirds of the black students in the Nashville system went to racially identifiable schools, and more than

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[1] These statistics are based largely upon plaintiffs' exhibits in the court below, but we can find no contrary evidence offered by defendants.

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four-fifths of the white students attended racially identifiable schools.

Busing did not come to Nashville by federal court decree. This record demonstrates that Nashville and Davidson County have long used extensive bus transportation as a normal part of their school systems. Busing was, however, employed wholly disproportionately for the transportation of its white students as compared to its black students (30,000 white to 3,500 black). In this regard the District Judge's opinion noted:

> "Since the defendants have consistently transported large numbers of students to promote segregation, some adjustment must be made to reverse this unconstitutional practice."

The District Court clearly found that defendants had defaulted in relation to their duty to dismantle their segregated school system prior to 1970. The District Court also found that although defendants had repeatedly been asked and ordered to produce an adequate plan, they had failed to do so. It noted that the School Board accepted as a policy statement "an ideal student racial ratio of an integrated school as one which is 15% to 35% black." Yet its analysis of the plan actually submitted by the School Board showed it to be utterly inadequate.

> The Board of Education submitted a plan for pupil integration in August, 1970. Included in this plan was a policy statement that the school board "accepts as an ideal student racial ratio of an integrated school as one which is 15% to 35% black."
>
> The August, 1970 plan made 49 minor geographic zone changes, and provided for the transportation of an additional 1162 pupils. The result of the plan was to leave the elementary schools significantly unchanged. Six of the 38 high schools and junior high

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schools would remain at least 50 per cent black. Fifty-seven per cent of the black high school and junior high school students would attend these six schools. The racial composition of two schools would be at least 95 per cent black and four other schools would be at least 90 per cent black. This would result in 47 per cent of the black students attending schools where the composition would be above 90 per cent black. Eight schools, accommodating 20 per cent of the black students, would operate with 15-35 per cent black students. Fifteen schools would operate with 95 per cent or above white students. (Footnotes omitted.)

Concerning the School Board plan, the District Court concluded:

> The pupil integration plan submitted by the school board, viewed in the most favorable light, constitutes mere tinkering with attendance zones, and represents only a token effort. It clearly falls short of meeting the objectives and tests set out in the decisions of the United States Supreme Court. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra; Davis* v. *Board of School Commissioners, supra; Green* v. *County School Board,* 391 U.S. 430 (1968). In effect, the defendant has made no effort to meet its affirmative duty to establish a unitary school system "in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board, supra,* at 437-38; quoted in *McDaniel v. Barresi,* [402] U.S. [39], 28 L.Ed.2d 582, 585 (April 20, 1971).
>
> Since the defendants have, in effect, failed to submit a constitutionally sufficient plan, the Court must examine the other plans. (Footnote omitted.)

The plan adopted by the District Judge was one proposed by the United States Department of Health, Educa-

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tion and Welfare. It is described in detail in his Memorandum Opinion, dated June 28, 1971, and in his Judgment, dated July 15, 1971, both of which are by reference hereby incorporated as a part of this opinion. For our present purpose it suffices for us to note that in all respects which have come to our attention, the HEW plan approved by the District Judge represents a somewhat less stringent approach to desegregation than the plan approved by the United States Supreme Court in *Swann, supra.*

Major portions of the Court's comprehensive Opinion and Judgment, such as those dealing with faculty desegregation, school construction and maintenance, and transfer policy, etc., are not discussed herein because no appellate issues have been presented as to those features.

I The Rule 23 Issue

As to the Rule 23 issue, earnestly if belatedly sought to be raised by appellants, we affirm the Memorandum Order of the District Judge, dated July 21, 1971, for the reasons set forth therein, and print same for ready reference as Appendix B.

Further, we note that this issue was clearly waived by failure of appellants to raise it prior to trial and final adjudication of this case.

We also note that such a class action as this dealing with continuing constitutional violations does not become moot because of years of delay (much of it attributable to appellants) which occasioned the graduation of the named, original student plaintiffs from the school system before final decision.

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II The Ratio and Residual Effect Issues (Plaintiffs' stated Issues 2, 3 & 4)

Where a school system has been deliberately constructed on a segregated basis by state action, a duty inheres in the School Board to do more than to establish rules fair on their face which simply serve to perpetuate the effects of such segregation. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 26, 28 (1971).

The record in this case supports the District Judge's findings that racial discrimination in school construction, assignment of temporary buildings, assignment of teachers, and assignment of students continued until the close of the record—if not beyond. The record also discloses a background of racial discrimination by means of state law which motivated much of the school segregation. (See Appendix A)

The fact that population shifts in the metropolitan school district have helped to some degree to change the racial composition of some schools during the course of litigation does not eliminate the duty of the school board to present a plan for a unitary school system.

Nor, of course, does it alter the duty of the District Court on default of the school board to require production of such a plan and order it into effect. Chief Justice Burger put the matter thus in the *Davis* case:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *School Commissioners of Mobile County, supra* at 37.

Perhaps the primary thing that the *Swann* case decided was that in devising plans to terminate such residual ef-

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fects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area[2] and to seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live.

We have noted that the District Judge in *Swann* employed a flexible 71% white to 29% black population ratio as a guide in seeking a practical plan. The Supreme Court specifically approved his doing so. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra* at 16, 23-24. The District Judge in this case clearly read and followed the *Swann* guideline. As to this issue, we find no error.

An earlier finding of "good faith" does nothing to excuse the defaults and failures shown by this record. "The measure of any desegregation plan is its effectiveness." *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). *See also Green* v. *County School Board*, 391 U.S. 430, 439 (1968).

III Practical Problems

If there is an appellate issue of substance in this appeal, it is to be found in the practical problems which appellants claim have developed since the entry of the District Judge's order. Appellant summarizes these issues thus:

> A plan which exposes the children in the school system to undue danger to health and accident, interferes with their education by requiring excessive periods of time on buses, causes them to leave home before daylight or to return home after dark, exposes them to the dangers of travel in old and inadequately maintained equipment and causes elementary school children, both black and white, to suffer hardships

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[2] The area referred to in this case is all of Davidson County, including the City of Nashville, which is included in the jurisdiction of defendant Metropolitan Board of Education.

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to which young children should not be exposed can hardly be termed feasible, workable, effective and realistic.

Substantial as these problems appear to be on the surface, there are two reasons why no relief can be granted in this forum. The first is that no motion for relief pertaining to these facts has ever been filed by appellant in the District Court. These statements at this point are allegations and they are controverted by the appellee. This, of course, is an appellate court—not a trial court. As appellants well know, the arena for fact-finding in the federal courts is the United States District Court. Until these claims have been presented in a trial court, with an opportunity for sworn testimony to be taken and controverted issues and facts decided by the processes of adversary hearing, this court has no jurisdiction.[3]

The second reason as to why appellants are entitled to no relief on this issue probably serves to explain the first. The entire "record" upon which appellant bases his plea for relief as to practical problems is a "Report to the Court" of Dr. Brooks, Director of Schools of the Metropolitan County Board of Education. This report is dated October 18, 1971, just over a month after the opening of school. While we are advised that it was sent to the District Judge, as we have noted, no motion of any kind seeking any District Court action was ever filed concerning it.

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[3] During the pendency of an appeal jurisdiction of the case lies, of course, in the appellate court. There is, however, familiar law to deal with an unexpected problem which arises in this period concerning the actual terms of the order or judgment under appeal. The District Court may on being apprised of the problem and having determined its substantiality (with or without hearing) certify to the appellate court the desirability of a remand for consideration or augmentation of the appellate record. No memory in this court encompasses a method of such a request.

The record is clear that no request for remand was made to the District Court, obviously at least in part, because appellants made no motion for relief before the District Court.

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Even more important, the statement on its face suggests that local authorities in Nashville and Davidson County have not made good faith efforts to comply with the order of the District Judge.

Dr. Brooks' affidavit does present this exculpatory explanation which serves to point in the direction of other authorities of those responsible for the inconveniences and hazards of which Dr. Brooks' statement speaks. The statement says:

> The School Board is fiscally dependent in that its budgets must be approved by the Metropolitan City Council. In approving the budget of the School Board on June 30, 1971, Council members demanded assurance that no funds included in the budget would be used to purchase buses for the purpose of transporting students to establish a racial balance. The 1971-72 budget did provide for the purchase of 18 large buses to replace obsolete equipment to provide transportation for students to the new comprehensive McGavock High School.

It is clear, however, that neither the Metropolitan City Council or, for that matter, the Legislature of Tennessee can forbid the implementation of a court mandate based upon the United States Constitution. In a companion case to *Swann, supra*, Chief Justice Burger, writing again for a unanimous court, held that an anti-busing law which flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibits busing for such purposes, was invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45-46 (1971). *See also Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Dr. Brooks' statement also furnishes the bus schedule of the Metropolitan County Board of Education by yearly

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models. It shows that the Board has an average of 18.9 buses for each of the last 10 model years. The 18 buses purchased in 1971 were described by Dr. Brooks as "to replace obsolete equipment." It appears from the Metropolitan Board's own statements that the Board and the local authorities in Nashville did not purchase one piece of transportation equipment for the purpose of converting the Metropolitan County Board of Education school system from a dual school system segregated by race into a unitary one, as called for by the District Judge's order.

At court hearing we had been puzzled as to why counsel for the Board had failed to go back to the District Court to report on the grievous circumstances which he so strongly alleged before us. Like most decrees in equity, an injunctive decree in a school segregation case is always subject to modification on the basis of changed circumstances. *Sloan v. Tenth School District of Wilson County*, 433 F.2d 587, 589-90 (6th Cir. 1970). Further acquaintance with the record, which, of course, the District Judge would have known in detail, leaves us in no further quandry as to the reasons for counsel's reluctance.

IV Plaintiffs-Appellants' Plan

Our review of this record convinces us that the District Judge's choice of the HEW plan as opposed to plaintiffs' plan was well within his judicial discretion. It may not be ideal, but to us it seems clearly to be a plan for ending a dual school system based on race and substituting therefor a unitary one. It promises to work and to work *now*. *Green v. County School Board of Kent County*, 391 U.S. 430 (1968).

V Plaintiffs-Cross-Appellants' Discrimination Claim

Plaintiffs-Cross-appellants claim that the grade school plan discriminates against Negro students in the lowest elementary grades.

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The feature complained of in this issue is the transportation of black students in grades 1-4 to outlying schools, paralleled by the cross-transportation of white students in grades 5-6. In this regard the HEW plan appears to follow the pattern of the school plan approved in *Swann*. *Swann v. Board of Education, supra* at 10. The Supreme Court made no reference to this feature, and neither in *Swann* nor in this case does the record seem to provide adequate rationale for it. We do not believe, however, that we can appropriately hold that the District Judge abused his discretion in approving the HEW plan which (like the plan in *Swann*) incorporated this feature.

It may be that this is a temporary expedient or it may be that there are practical reasons to justify it for longer duration. In any event, any adverse effects of this aspect of the plan can, of course, likewise be brought to the District Judge's attention when the case is back before him.

The Intervention

Twenty-four hours before oral arguments in this appeal, the United States Department of Justice filed a motion to intervene as amicus curiae. In spite of the extraordinary delay in filing the motion, we granted leave to intervene and invited the representative of the Justice Department who appeared to address the court.

On reading the motion, hearing oral argument, and questioning counsel, we determined that the representative of the Justice Department had not had the opportunity to read the District Court record in this case and was not aware in advance of hearing that the claimed practical problems had never been presented to or adjudicated by the District Judge.

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One America

This nation has been told by a Presidential Commission that our country is rapidly becoming divided into two societies—one black and one white. REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (3/1/68).

The Constitution of the United States was written for one nation, "indivisible." As it speaks to men's consciences, the Constitution argues against division and apartheid.

In the public domain, however, the Constitution commands. Here the constitutional command is One America.

The Constitution and the Supreme Court opinions quoted above do not command the use of busing any more than they command the use of books, desks, paper, pens, buildings, lights, heat, and other tools, equipment and supplies needed in modern life and in modern education. What the Constitution and the Supreme Court say about the principal issue of this case is that no one may forbid a school board (or a federal court) from employing any of the tools of modern life in carrying out a constitutional mandate. *Davis* v. *Board of Commissioners of Mobile County*, 402 U.S. 33, 37-38 (1971).

The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been!) to the parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arise in the future.

We now affirm the findings of fact, conclusions of law, and judgments of the District Court.

The District Judge's order noted that no stay would issue and we likewise note that any stay of this order must be sought from the United States Supreme Court.

Appendix A

CHAPTER 37
SEGREGATION OF RACES

SECTION

49-3701—49-3703. [Unconstitutional.]

Compiler's Note. Under the decision of Roy v. Brittain (1956), 201 Tenn. 140, 297 S. W. (2d) 72, the statutes providing for the compulsory separation of races in the field of public education are no longer in effect, and therefore these sections have been omitted. They read:

49-3701. Interracial schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. [Acts 1901, ch. 7, § 1; Shan., § 6888a37; Code 1932, § 11395.]

49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement. [Acts 1901, ch. 7, § 2; Shan., § 6888a38; Code, § 11396.]

49-3703. Penalty for violations.—Any persons violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months. [Acts 1901, ch. 7, § 3; Shan., § 6888a39; mod. Code 1932, § 11397.]

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49-3704. [Unconstitutional.]

Compiler's Note. This section was held unconstitutional in Kelly v. Board of Education (1959), 270 Fed. (2d) 209 and is, therefore, omitted. It read:

49-3704. Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race. [Acts 1957, ch. 11, § 1.]

CHAPTER 22—TRANSPORTATION OF SCHOOL CHILDREN

SECTION.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.

49-2210. Color and markings of buses.

49-2213. Speed limit.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.—Boards of education may provide school transportation facilities for children who live over one and one-half (1½) miles by the nearest accessible route from the school to which they are assigned by the board of education and in which they are enrolled; provided, however, that the boards of education may, in their discretion, provide school transportation facilities for children who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled, but the county shall not be entitled to receive state transportation funds for any student, other than physically handicapped children, who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled; provided, that nothing in this chapter shall be construed to prevent a board of education from transport-

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ing physically handicapped children, regardless of the distance they live from school, under rules and regulations adopted by the state board of education with the approval of the state commissioner of education, and provided further, that said boards shall have power to purchase school transportation equipment, employ school transportation personnel, and contract for transportation services with persons owning equipment, and pay for same out of funds duly authorized in the budget approved by the quarterly county court; provided further, that said boards in employing school transportation personnel and in contracting for transportation services with persons owning equipment are hereby authorized to enter into contracts for such services for periods of time as long as, but not exceeding, four (4) years from the date of making such contracts, it being the purpose of this section to permit a reasonable degree of employment security for such school transportation personnel.

Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another. [Acts 1947, ch. 92, § 1; 1949, ch. 233, § 1; C. Supp. 1950; § 2495.1 (Williams § 2495.2); Acts 1957, ch. 10, § 1; 1957, ch. 400, § 1; 1970 (Adj. S.), ch. 491, § 1.]

Amendment. The 1970 amendment added the last paragraph to this section.

Effective Date. Acts 1970 (Adj. S.), ch. 491, § 2. February 27, 1970.

[Note that a statute similar to the proviso in the last paragraph of the statute above was held unconstitutional by the United States Supreme Court. *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971).]

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Appendix B

MEMORANDUM AND ORDER

(Filed July 21, 1971)

The defendant Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, filed two motions, to-wit, a motion to set aside the judgment entered in this cause on July 16, 1970, and a motion to set aside the memorandum opinion filed June 28, 1971, which motions are grounded on the failure of the Court to comply with Rule 23 of the Federal Rules of Civil Procedure.

Apparently these motions were filed without counsel for the defendant having made even a casual perusal of the record in the consolidated cases.

The history of the consolidated cases reveals:

The first cause of Robert W. Kelley, et al. v. Board of Education of the City of Nashville, Davidson County, Tennessee, et al., Civil No. 2094, was filed on September 23, 1955. This case will be hereinafter referred to as the "first case."

The case of Henry C. Maxwell, Jr., et al. v. County Board of Education of Davidson County, Tennessee, et al., Civil No. 2956, was filed on September 19, 1960. This case will be hereinafter referred to as the "second case."

These cases were consolidated by consent order filed September 10, 1963.

Rule 23 of the Federal Rules of Civil Procedure as to class action was amended, effective July 1, 1966. Prior to the amendment, class actions were referred to as "spurious" or "true" class actions. Prior to the amendment, the requirements for the maintenance and determination of

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the existence of a proper class action were less stringent than those requirements as set forth in Rule 23, as amended. Prior to its amendment, Rule 23 did not require detailed findings and determinations by the Court as set forth in subsection (c) of the Rule, as amended.

First Case

By Memorandum filed on January 21, 1957, the Honorable William E. Miller determined "that the rights of the plaintiffs and other similarly situated to attend the public schools of the City of Nashville without discrimination on account of race are recognized and declared." Record, Min. Book 19, at 679.

By findings of fact and conclusions of law filed on February 20, 1957, the Honorable William E. Miller adjudicated that Case No. 2094 was "properly brought as a class action under Rule 23 (a) of the Federal Rules of Civil Procedure. Title 28 U.S.C." Record, Min. Book 19, at 783.

On August 15, 1958, the case was appealed to the Sixth Circuit Court of Appeals. On July 20, 1959, the Court of Appeals affirmed the judgment of the District Court, thereby affirming the determination of the Honorable William E. Miller that this was a proper class action.

On September 10, 1963, a consent order was entered in Case No. 2094, the first case, and Case No. 2956, the second case, in which the parties agreed and stipulated that the functions and powers of the defendants Board of Education of the City of Nashville and County Board of Education of Davidson County were vested in the Metropolitan School System, and the "Transitional Board of Education for the Metropolitan Government of Nashville and Davidson County" was substituted as defendant. All orders, judgments, and other proceedings in the first case and the second case were made effective as to the substituted de-

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fendant. There was an express provision that all orders, judgments and proceedings entered previously would remain in full force and effect, and that none of the rights of the parties would be affected or prejudiced.

By order of December 3, 1964, the Metropolitan County Board of Education and its board members were made parties defendant in lieu of the Transitional Board. Again, there was a provision that all orders, judgments and proceedings in both cases would remain in full force and effect and that none of the rights of any parties would be affected or prejudiced.

By order entered on October 7, 1968, certain additional parties, including infants and their parents, were added as intervening plaintiffs to have full standing as plaintiffs.

The two cases were again appealed to the Sixth Circuit Court of Appeals. The opinion of the Court of Appeals was filed in this Court on February 8, 1971.

Second Case

On November 23, 1960, the Honorable William E. Miller adjudicated that "this is a class action brought not only by the plaintiffs for their own benefit but also on behalf of all other persons similarly situated." Record, Min. Book 24, at 114.

This case was appealed to the Court of Appeals for the Sixth Circuit on February 20, 1961.

The orders in the consolidated cases of September 10, 1963, December 3, 1964, and October 7, 1968, noted above also apply to this case.

As appears above, the Honorable William E. Miller carefully adhered to Rule 23 as it existed at the time of the filing of these two cases. The Court of Appeals did not question his determination, but affirmed the actions which he took in the matter. In addition, in the latest mandate

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to the District Court received from the Court of Appeals in February, 1971, this Court was instructed to implement the July 16, 1970 opinion of the Honorable William E. Miller.

This Court does not feel once a class action has been adjudicated and the action of the trial court has been reviewed by the Court of Appeals, that it is necessary or proper to continue to redetermine the standing of the plaintiffs to represent a class. The United States Supreme Court in its order implementing the amendment to Rule 23 states:

> ". . . the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice in which event the former procedure applies."*

See also Escott v. Barchris Construction Corp., 283 F. Supp. 643 (S.D. N.Y. 1968); Polakoff v. Delaware Steeplechase and Race Assn., 264 F. Supp. 915 (Del. 1966).

This clearly indicates an intent that there should not be a continuous readjudication of this question in cases where there has been a lengthy history of litigation, both in the district and the appellate courts. Frankly, this Court feels that it is not feasible or practical to have continuous adjudication of such items.

In view of the above, the Court is not required to determine (1) whether this question should have been raised

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* Paragraph 2, Order of the Supreme Court of the United States, February 28, 1966, reporting amendments to the Federal Rules of Civil Procedure for the United States District Courts to the United States Senate and House of Representatives. This is reported in 15 L.Ed.2d lxxv.

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prior to the adjudication of the cause, and (2) what, if any, effect the alleged failure to comply with Rule 23 would have on the right of the individual plaintiff children who reside throughout Davidson County, Tennessee, to assert their constitutional privilege to attend an integrated school in a unitary school system.

The motions are hereby denied.

L. CLURE MORTON
United States District Judge

McCree, Circuit Judge (Concurring). I agree with the majority opinion on the issues it discusses. Nevertheless, I wish to add a few observations concerning our reasons for rejecting plaintiffs' cross-appeal and affirming, for the present, the District Court's selection of the HEW plan.

The District Court, in deciding to reject plaintiffs' plan, recognized that under *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Davis v. School Commissioners of Mobile County,* 402 U.S. 33 (1971); and *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968), its duty was to select the plan that appeared to be the most effective in eradicating the effects of past segregation, unless it would be impractical to adopt such a plan. The court found that plaintiffs' plan was "impractical and not feasible" because of the costs and transportation problems that would result from the inclusion of certain out-county schools in the plan. The court also relied upon the fact that plaintiffs' plan left to the school board the specifics of pupil assignment, grade organization, school structuring, and school district zoning.

My colleagues and I agree that there is no need at this juncture to hold that the District Court abused its discretion in thus preferring the HEW plan over that of plaintiffs. The HEW plan promises to accomplish a significant degree of integration, and it is a plan that promises

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realistically to work and to work now. *Green v. County School Board of New Kent County, supra*, 391 U.S. at 439. Although plaintiffs' plan might have more effectively desegregated the district's schools, its inclusion of outlying schools and its lack of specificity rendered it, in the court's opinion, impractical and unfeasible. Since the District Court has retained jurisdiction in order to supervise the implementation and effectiveness of the HEW plan, plaintiffs have the option of revising their plan to eliminate the defects noted by the court and requesting the court to make specific changes in the plan to promote, in a practical way, more effective integration. If the court should then find that plaintiffs' plan is "feasible and pedagogically sound." *Robinson v. Shelby County Board of Education*, 442 F.2d 253, 258 (6th Cir.), *on remand*, 330 F. Supp. 837 (W.D. Tenn. 1971), *appeal pending*, No. 71-1966 (6th Cir.), it would be required to adopt this plan. *See Harrington v. Colquitt County Board of Education*, No. 72-1579 (5th Cir. May 10, 1972); *Manning v. Board of Commissioners of City of Jackson, Tennessee*, 453 F.2d 259, 262 (6th Cir. 1972), *cert. filed*, 40 U.S.L.W. 3491 (U.S. March 31, 1972) (No. 71-1299); *Robinson v. Shelby County Board of Education, supra*; *Davis v. School District of the City of Pontiac, Inc.*, 443 F.2d 573, 576-77 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). In the special circumstances of this case, therefore, there is no need to remand and thereby possibly postpone implementation of the first desegregation plan ordered into effect in this school district that promises, after 17 years of litigation, realistically to work now.

With respect to plaintiffs' contentions that the District Court abused its discretion in adopting a plan that places the greater burden of desegregation on black children and their parents, I observe initially that although the plan approved by the Supreme Court in *Swann* appears to have contained a provision that in some respects resembles one

1970); *Brice v. Landis*, 314 F. Supp. 974, 978-79 (N.D. Cal. 1969), or in terms of an abuse of the court's discretion in fashioning an equitable remedy to rectify the effects of past injustice. Although adoption of such a plan might be justified on the basis of the nature of facilities involved, or on practical, administrative considerations, or on the need to adopt a temporary expedient to assure at least immediate substantial progress toward the creation of a unitary school system (*see Swann v. Charlotte-Mecklenburg Board of Education, supra*, 306 F. Supp. at 1298), we cannot determine the reason for the District Court's decision because the court did not discuss this issue in its memorandum opinion. Ordinarily, in such a case, we would remand for findings and conclusions by the District Court. *See Gordon v. Jefferson Davis Parish School Board*, 446 F.2d 266 (5th Cir. 1971) (per curiam).

However, the same considerations that argue against remand on the issue of the court's adoption of a less effective plan are persuasive here as well. The integration plan adopted by the court has been in operation during the 1971-72 school year, and the court has retained jurisdiction of this case to oversee and, if necessary, to modify the plan's implementation. The defendant school board has indicated in this court that it intends to seek modification on the basis of asserted practical problems that have become apparent since the plan was put into effect. Plaintiffs have indicated dissatisfaction with the adoption of a plan less effective than that proposed by them, and we have indicated that they may seek further relief in the District Court. In these circumstances, I agree that we should not now disturb the District Court's approval of the HEW plan and possibly encourage the kind of delay and inaction that has caused this case to pend for 17 years. Plaintiffs may seek modification of the court's order on the ground that the plan places a disproportionate burden on black children and their parents, and this issue can be

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litigated and determined before the beginning of the 1972-73 school year. In this way, the disproportionate burden asserted by plaintiffs will exist at most for only a short period of time and will amount to no more than a transitory phase (assuming the absence of sufficient justification for maintaining it permanently) in the over-all creation of a unitary school system.

It is to be emphasized, nevertheless, that our refusal to take affirmative action on this issue at this time results only from the peculiar timing, posture, and history of this case. Our opinion should not be construed in any way as a qualification of the principle that a district court has an obligation to endeavor to distribute the burden of integration equitably on all races and that any deviation from this norm, without a compelling justification, is impermissible.

Finally, I observe that the majority opinion does not discuss plaintiffs-appellees' contention that they should be awarded double costs and attorneys' fees because the school board's appeal is frivolous within the meaning of Fed. R. App. P. 38. Since the class action issue obviously has no merit, and since the only issue raised by the Board that might have merit has never been presented to the District Court, I would award the requested double costs and attorneys' fees. *See Coppedge v. Franklin County Board of Education*, 404 F.2d 1177, 1179-80 (4th Cir. 1968); *cf. Monroe v. Board of Commissioners of City of Jackson, Tennessee, supra*, 453 F.2d at 262-63. The long history of this litigation would, in my opinion, make such an award particularly appropriate. *Cf. Clark v. Board of Education of the Little Rock School District*, 449 F.2d 493, 499 (8th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3400 (U.S. Jan. 27, 1972) (No. 71-751).

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APPENDIX "C"

United States Court of Appeals
for the Sixth Circuit

Robert W. Kelley, et al., Plaintiffs-Appellees, vs. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al., Defendants-Appellants.	Nos. 71-1778-79.

ORDER

(Filed July 25, 1972)

Upon consideration of the Appellants' motion for a stay of the mandate pending an application to the United States Supreme Court for writ of certiorari and the Appellees' response in opposition thereto,

It is ordered that the motion be and hereby is denied.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk

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APPENDIX "D"

In the United States District Court for the Middle District of Tennessee, Nashville Division

Robert W. Kelley et al., Henry C. Maxwell, Jr., et al.

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.

Civil Actions Nos. 2094, 2956.

REPORT TO THE COURT

(Filed October 19, 1971)

The undersigned Director of the Metropolitan Public Schools files this report of the results of the first month's operation under the court ordered plan for further desegregation of the Metropolitan Nashville School System adopted by the Court on June 21, 1971, following, with some minor modification, the recommendation of the Department of Health, Education and Welfare.

The plan adopted was effective as of September 1, 1971, and required the reorganization of the grade structure of 82 schools and changed the racial composition and population of 94 schools. The following is an analysis of the results of the operation of the plan for approximately one month.

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Total number of elementary and secondary schools	133
Number of schools ideally integrated (between 15%-35% black)	47
Percentage of schools ideally integrated (between 15% and 35% black)	35%
Number of schools over 50% black	13
Number of schools over 40% black	41
Number of schools less than 15% black	31
Number of schools over 90% white (not in all instances the same schools as the less than 15% black)	31
Total enrollment as of June 1971	93,488
Projected enrollment for 1972	96,000
Actual enrollment as of October 12, 1971	87,770

There are 49,000 students eligible for transportation under the plan adopted by the Court. Of this number, approximately 28,000 pupils are being transferred from their original school zone to a new school zone in order to increase integration. During the prior school year, the mileage of the school buses in transporting the school children was about 3,000,000 miles. Under the plan, the mileage is approximately 6,000,000 miles. There are 211 buses available with an average capacity of 70 children per trip. If all buses were completely occupied, 14,770 children could be transported. In order to handle the children eligible for transportation, it is necessary for all buses to make three round trips daily and for some of the buses on shorter routes to make as many as five trips daily.

In order to comply with the Court's order and to meet pupil transportation needs, all reserve buses were put

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into service. Pupil eligibility for transportation was extended from 1¼ to 1½ miles which means that only children living more than 1½ miles from school are eligible to be transported. The high school day was shortened from 7 hours to 6 hours. 133 school openings were staggered to begin at 30 minute intervals from 7:00 A. M. to 10:00 A. M. The closing period of the schools was also staggered at 30 minute intervals and the latest schools to let out are at 4:00 and 4:30 P. M. in the afternoon. Transportation for field trips and special fine arts performances which had heretofore played an important role in the educational opportunities of the pupils was eliminated.

During the period of operation, there have been an average of 12 breakdowns per day. Since all buses are in use, the pupils on the buses having mechanical trouble must wait until another bus has delivered its children and returns for them. The maintenance shops have only four bays to service and repair the 211 large buses and the 60 small special educational buses which have a capacity of some 12 to 18 students and are used exclusively for special education, that is, for the transportation of the handicapped and/or retarded. Prior to the adoption of the present court order, the maintenance department had 4½ hours in the middle of each day to service the buses. Only 2 hours are now available because buses are on the road from 6:00 A. M. to 10:30 A. M. transporting students to the staggered openings of the schools and from 12:30 P. M. to 6:00 P. M. returning students from the staggered closings of the schools to the various pick-up points. It is anticipated that the frequency of breakdowns will increase as a result of the extensive use of the equipment, its age and the lack of detailed maintenance.

The community reverts to Central Standard Time the last of October. During the late fall and winter months,

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darkness comes earlier. The Weather Bureau has informed the School Board that on December 1, 1971, a typical winter day, the sun will rise at 6:39 A. M., Central Standard Time, and will set at 4:32 P. M., Central Standard Time. This assumes good weather. In bad weather, darkness comes earlier. Early and late starting times of school create safety hazards for the students, many of whom during the winter will be leaving home or returning to their homes after dark. Buses serving schools opening at 7:00 A. M. begin their routes at 6:05 A. M. which is 34 minutes before sunrise on December 1. Children must walk to the designated pick-up points. Consequently, the children picked up at the beginning of the route may be on the street as much as one hour before sunrise. It should be remembered in this connection that children who live within a mile and a half of the school to which they are assigned are not furnished transportation and many of these children will begin their walk to their designated school in darkness and some of them will return home from school walking in the dark. Sundown on December 1, 1971, is at 4:32 P. M., with darkness following immediately. Elementary school children on late shifts who live 1½ miles or less from their schools which let out at 4:30 will be walking home in darkness and in many instances without street lights or sidewalks.

The school buses that serve the 10 schools that open at 7:00 A. M. begin their routes at 6:05 A. M. or 34 minutes before sunrise. The children walk to designated pick-up points. Of the 10 schools opening at 7:00 A. M., there are neither street lights nor sidewalks in the immediate vicinity of 7 schools. There are street lights but no sidewalks in the immediate vicinity of one school. There are 28 elementary schools which open at 10:00 A. M. and close at 4:30 P. M., two minutes before sundown on December 1. There are 25 schools which open at 9:30 A. M.

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and close at 4:00 P. M. Many elementary school children eligible for transportation who attend the schools closing at 4:30 will be returned to their pick-up points about an hour and 15 minutes after sunset. Many of those attending school closing at 4:00 P. M. will be returned to their pick-up points about 45 minutes after sunset. Of these 53 schools, 16 have neither street lights nor sidewalks in the immediate vicinity. 5 have no sidewalks but have street lights and 2 have no street lights but have sidewalks. These children, both walkers and riders, are placed in a hazardous position when returning home from school or from the pick-up point.

The average time of a student on a bus transported across town to school is 45 minutes one way. The longest period of time required for cross-town transportation is 1½ hours each way. 28,000 pupils are transported from the suburbs to the inter-city or vice versa each day. There are approximately 400 round trips across town by the 211 buses each day.

In many instances, the bus routes follow the interstate highway because of the saving of time involved by use of these highways. The hazards of transportation are increased, however, by use of the interstate highway system. This is because when there is a breakdown on the interstate, the dangers to the students being transported are much greater than if the breakdown had occurred off the interstate highway system. The use of the interstate highway system is not desirable and the Metropolitan Public School System would prefer to route its buses some other way. Because of the lack of buses and the necessity of compliance, the Metropolitan School System has no choice but to use the interstate highway system and reduce the time required for transportation so that buses can make more trips and haul more students and thus comply with the Court's decree. Of the 211 buses in service,

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18 are new. Only 18 additional buses could be acquired for financial reasons.

The age of the buses used to transport the children is as follows:

1971 models—18 buses
1970 models—15 "
1969 models—10 "
1968 models—10 "
1967 models—67 "
1966 models—25 "
1965 models—14 "
1964 models—12 "
1963 models— 5 "
1962 models—13 "
1961 models— 5 "
1960 models— 4 "
1959 models— 2 "
1958 models— 8 "
1957 models— 3 "

I have heretofore stated that under the plan, it is necessary for the buses to travel approximately 6,000,000 miles per year. Of this mileage, the 211 large buses travel a little more than 5,000,000 miles per year or an average of 140 miles per day. The remaining mileage is accounted for by the small special buses transporting the handicapped and/or retarded children.

The foregoing transportation plan was approved by the Board in anticipation of the availability of Federal funds to purchase additional equipment and defray additional operating costs. The anticipated funds have not been forthcoming. Application has been made to the Regional

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Office of Education, Division of Equal Educational Opportunity, Atlanta, Georgia, for assistance. It is not anticipated that any additional funds will be made available for the transportation of students in view of the public declaration of the President of the United States that no presently authorized funds will be used for this purpose. Estimated costs of additional equipment, operation and maintenance are:

Eighty-seven 84-passenger buses at $16,300	$1,418,100
Maintenance equipment	177,000
Operation costs for one year	700,000
Maintenance facilities and land	1,350,000
Installation of safety loading zones at 42 schools	56,000
Total	$3,701,100

The School Board is fiscally dependent in that its budgets must be approved by the Metropolitan City Council. In approving the budget of the School Board on June 30, 1971, Council members demanded assurance that no funds included in the budget would be used to purchase buses for the purpose of transporting students to establish a racial balance. The 1971-72 budget did provide for the purchase of 18 large buses to replace obsolete equipment to provide transportation for students to the new comprehensive McGavock High School. Notwithstanding the attitude of the City Council, the School Board is now preparing to make application to the Council for additional funds to acquire additional buses so that the plan adopted by the Court may be carried out. If funds were made available for this purpose and orders were placed for buses today, they could not be manufactured and delivered to the School Board for use earlier than six months from the date of the order. Consequently, regard-

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less of whether additional funds are or are not obtained or whether new buses can or cannot be acquired, inadequate transportation facilities and equipment will continue to require extended scheduling of school openings and closings and extended distances non-bused children must walk to and from school. In addition, the School Board will continue to operate without a reserve fleet of buses to care for emergency situations. The result is that there will be serious interruptions of transportation service during the cold winter months and these interruptions will constitute a hazard to the health of the students as well as a safety hazard. Unless unanticipated assistance is forthcoming promptly, I do not see how the present plan can continue safely during the winter months.

Dated: October 18, 1971.

/s/ ELBERT D. BROOKS
Director of Schools
Metropolitan County Board
of Education

State of Tennessee
County of Davidson

Elbert D. Brooks, being first duly sworn, states that he has read the foregoing Report to the Court and that the statements made therein are true to the best of his knowledge, information and belief.

/s/ ELBERT BROOKS

Subscribed and sworn to before me this 18th day of October, 1971.

NINA L. PHELPS
Notary Public

My Commission Expires Feb. 7, 1973.

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Signed Copy

OCT 21 1972

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-313

ROBERT W. KELLEY, et al., HENRY C. MAXWELL, JR. et al.,
Respondents,

v.

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, C. R. DORRIER, Chairman, et al.,
Petitioners.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman, heretofore filed with this Court a petition for writ of certiorari in this case.

This supplemental brief is filed pursuant to Rule 24(5) of the rules of this Court for the purpose of challenging to the attention of his Honorable Court the decision and

opinion of the Sixth Circuit Court of Appeals in the case of James Jonathan Mapp, et al. v. The Board of Education of the City of Chattanooga, etc., et al. decided and filed October 11, 1972 wherein the Sixth Circuit Court in effect reversed the captioned case. A copy of the opinion in Mapp v. Board of Education of the City of Chattanooga is attached hereto.

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Certificate of Service

I hereby certify that a copy of the foregoing supplemental brief has been placed in the U. S. Mail to the Hon. Avon N. Williams, Jr., Hon. Julian W. Blackshear, Hon. Russell B. Ennix, 1414 Parkway Towers, Nashville, Tennessee 37201 and Hon. Jack Greenberg, Hon. James M. Nabit III, Hon. Norman J. Chachkin, Hon. Sylvia Drew, 10 Columbus Circle, New York, New York 10019 on this 20th day of October, 1972.

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APPENDIX

Nos. 71-2006, 71-2007, 72-1443 and 72-1444

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

James Jonathan Mapp, et al.,
Plaintiffs-Appellants
and Cross-Appellees,

v.

The Board of Education of the City of Chattanooga, etc., et al.,
Defendant-Appellee
and Cross-Appellant.

Appeal from United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed October 11, 1972.

Before WEICK and EDWARDS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. In their appeal in the main case the plaintiffs contend that the District Court erred in approving an interim high school plan which left the majority of black students in segregated schools; in approving a plan which left Junior High Schools and Elementary Schools racially identifiable; in approving continued racial identifiability of schools on constitutionally impermissible grounds; and in imposing a disproportionate burden on black students by ordering the closing of black schools and not white schools. The plaintiffs pray, therefore, that the case be remanded with instructions to enter detailed findings of fact with respect to these measures,

and in the absence of compelling justification that the plan be disapproved. They also ask us for a declaratory judgment.

The defendants contend that they were not in default, and that over the years they have always complied with all orders entered by the District Court, except the order from which both parties are now appealing. They contend that the order was unjustified since they had not been in default; that the order goes too far in requiring pairing and clustering of schools, and in requiring the expenditure of large sums of money to purchase buses to provide transportation to achieve a quota or racial balance in each and every school in the school system.

The Board of Commissioners of Chattanooga has appealed, contending that its due process rights have been violated by the order of the Court; that the Board of Commissioners is not bound by orders of the Court made prior to the time it was made a party to the litigation; and that it (Board of Commissioners) alone, and not the Board of Education, has the power and authority under Tennessee law to appropriate funds and levy taxes.

It is obvious to us that none of the parties is satisfied with the desegregation order of the District Court and that the main appeal is only a piecemeal appeal. For the reasons hereinafter set forth, and in compliance with the request of the plaintiffs we remand for further consideration and direct the District Court to present a plan which will finally determine this apparently-indeterminable litigation, which is now more than twelve years old. We do not grant to plaintiffs declaratory relief which they request, as this is beyond our jurisdiction as an Appellate Court. Plaintiffs' request for declaratory relief should be presented to the District Court.

I

HISTORY OF THE CASE

These appeals graphically illustrate developments in the law relating to school desegregation since *Brown I* and *Brown II* which, even after *Swann,* and related cases, have perplexed and confused judges, lawyers and legal scholars.[1]

In the present case the School Board has been subject at all times to the continuing jurisdiction and supervision of the District Court since 1960, and the District Judge since he took over the case has handled promptly all matters submitted to him.

The Board has co-operated in all respects with the District Court and has complied with all of its orders except those orders from which both parties have appealed and which involve the expenditure of large sums of public funds for busing.

In 1962 the Court approved a plan for the gradual desegregation of the Chattanooga public schools, which plan undertook to desegregate all of the elementary schools by 1965, and the Junior High Schools in 1966, all high schools in 1968, and Chattanooga Technical Institute in 1969. The Court found that the plan was "a prompt and reasonable start toward desegregation and as accomplishing full desegregation with all deliberate speed." Upon appeal, the judgment of the District Court was affirmed except as to technical and vocational courses, and the case was remanded for further proceedings with respect to them. *Mapp v. Board of Educ.,* 319 F.2d 571 (6th Cir. 1963).

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[1] The Supreme Court, 1970 Term, 85 Harvard Law Review, p. 74 (1971); School Desegregation After Swann, A Theory of Governmental Responsibility, Univ. of Chicago Law Review No. 2, Winter 1972.

On March 29, 1965 the plaintiffs moved for further relief seeking an acceleration of the plan for desegregation which the Court granted, requiring all grades to be desegregated by September, 1966. On appeal we affirmed, except as to faculty assignments. *Mapp v. Board of Educ.*, 373 F.2d 75 (6th Cir. 1967).

On March 29, 1967, the case was restored to the docket for further consideration of the issue of faculty assignments.[2] Nothing then occurred until twenty-one months later when plaintiffs filed another motion for further relief.[3] About eleven months later plaintiffs filed a motion for immediate relief.

The Board answered the motions, stating that no decisions based on race had been made by it since the beginning of the academic year 1966-67, and further, since that time "no person has been excluded from any school because of race or color", and that the Chattanooga School System is a unitary system within the meaning of *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).[4]

In an opinion dated February 19, 1970, the Court discussed the Supreme Court decisions and decisions of this Court intervening between the date of its approval of the plans for desegregation, and the present time, and in view of disputed factual issues it ordered an evidentiary hearing.

On May 19, 1971, the Court rendered an oral opinion from the bench, in which it found that the school system

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[2] Faculty assignments are no longer an issue.

[3] The motions for further relief were usually filed after rendition of new opinions by the Supreme Court.

[4] The Board was of the view that prior to *Swann*, it had no right to assign children on the basis of race.

was not unitary and suggested that the Board read some of the more recent decisions of the Supreme Court and of this Court, and ordered it to file another plan for desegregation.

In response thereto the Board filed such a plan containing provisions which it deemed necessary in order to comply with the order of the Court. The Court approved the plan with certain modifications, and both parties have appealed. *Mapp v. Board of Educ.*, 329 F. Supp. 1374 (1971). The plan as approved by the Court will require an initial capital outlay and operational expenditure of $468,126. 329 F.Supp. at 1386.

The history was detailed here in order to dispel any inference or claim that only the Board is responsible for all the delay in this case. The District Court did not blame the Board. It was of the view that the plans which it had previously approved would eliminate all vestiges of racial discrimination. It was only upon consideration of recent Supreme Court cases and decisions of this Court that the District Court concluded this had not been accomplished. The Court said:

> "In the intervening years very substantial progress has been made. Following appellate guidelines as they then existed, this Court believed upon each previous occasion it entered desegregation orders, first in 1962, then in 1965 and 1967, that all vestiges of the dual system of schools would be removed upon fulfillment of its orders and only a unitary system remain. Experience and appellate redefinition of the concept of a unitary school system have now mandated that further steps be taken to accomplish the full and final desegregation of the Chattanooga schools. As reflected by the undisputed evidence, a number of the Chattanooga schools remain racially identifiable" (329 Fed.Supp. at 1380).

In the areas of state action, in what manner and to what extent a dual system must be dismantled so as to become a unitary system, still is unclear. See footnote 1.

In our opinion, the fact that the Board obeyed the order of the Court and filed a plan which it believed the Court required, and which the Court did adopt with modifications, did not estop it from appealing from the judgment approving such plan.

On more than one occasion the Court has commented on the good faith of the Board.

In denying an application of counsel for plaintiff for attorney's fees, the Court said:

> "Turning finally to the motion for the allowance of attorney fees for all legal services performed on behalf of the plaintiffs since the filing of this lawsuit, the Court is of the opinion that the motion should be denied. In the absence of a showing of bad faith on the part of defendants, the Court is of the opinion that the allowance of attorney fees would not be proper. This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of *Green v. School Board of New Kent County*, 391 U.S. 430, 20 L.Ed 2d 716, 88 S.Ct. 1689 (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been

resolved, the Board has at all time complied or attempted to comply in good faith with the orders and directions of the Court."

II

FIXED RACIAL BALANCE AND QUOTAS IN EACH SCHOOL

Plaintiffs' plan, which they contend the Court erred in not adopting, was prepared by its expert witness, Dr. Michael Stollee. This plan, as stated in plaintiffs' brief, provides:

> "His [Dr. Stollee's] plan proposed the desegregation of elementary schools by use of pairing, grouping and clustering (Tr. 1583) resulting in distribution of no less than 30 or no more than 70 percent racial concentration of blacks or whites in every elementary school. His plan for junior high projected desegregation by redirecting the elementary feeder system, using the new groupings provided in his elementary plan (Tr. 1594). The distribution again was projected within the 70-30 range (Tr. 1890). He proposed rezoning the four general purpose high schools to achieve a racial distribution between 49.1% to 51.9% black (Tr. 1601). Transportation would be required for some, though not all students under each phase of the plan (Tr. 1645). His plan provided for the transfers of faculty to remove racial identifiability (Tr. 1609) and affirmative language for protection of teachers in the desegregation process (Tr. 1614). Construction policy in his plan provided that this school board would have an affirmative duty to place schools to further integration (Tr. 1620)."

This plan is "based upon an allowable 20% variation on either side of the total racial population with the result

that all schools would have at least 30% of each race and not more than 70% of the other race. (Tr. 1585)." Appellees' brief, page 48.

The plan which the Court approved achieves "a racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system with but five exceptions, the . . ." 329 F.Supp. 1374, 1382. As to the five exceptions, the Court found that the imbalance was not the result of past or present discrimination. A similar racial balance was provided for the Junior High Schools. Senior High Schools are still under consideration.

It is thus apparent that the plaintiffs' plan requires a fixed racial quota or balance in each and every school in the system, while the plan adopted by the Court requires such ratio in all but five schools. Both plans certainly do provide for "maximized integration."

We do not read *Swann* and related cases as requiring a *fixed* racial balance or quota in each and every school in a city, irrespective of the residential patterns of the city. Yet that is exactly what both of these plans provide.

If there was any doubt about *Swann* not requiring such quotas, the doubt was dispelled in Chief Justice Burger's opinion in *Winston-Salem Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221 (1971), ruling on an application for a stay.

The District Court was obviously impressed by the fact that in *Swann* the Supreme Court affirmed a judgment requiring massive busing to an extent much greater than that in the present case. We do not have before us the record in that case for purpose of making comparison, but we are certain that *Swann* involved a situation entirely different than the case at bar, because of the failure of the Board of Education in *Swann* to co-operate with the District Court, and it was clearly in default. We do

not believe that the Supreme Court in *Swann* was telling District Courts to adopt massive busing orders such as was involved there.

In reality, in cases involving massive busing the school children of both races are being used in an effort to integrate the races in the entire school system. This is a far cry from *Brown I* and *Brown II*, and involves impingement on the constitutional rights of the children who do not wish to be so used.

We do not consider that *Swann* issued a general command that all United States District Judges imitate and enforce the colorful and dramatic orders of Judge McMillan. It merely permitted what he had ordered.

In *Goss v. Board of Education*, 444 F.2d 632, 636 (6th Cir. 1971) we observed:

> "The District Court opinions reflect in observable measure Judge McMillan's doubts as to the genuineness of the school authorities' concern for the constitutional rights of both the black and white school children of Charlotte and Mecklenburg Counties. The broadness of their commands bespeak some motivation of reprisal. . . . We, therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the *Mecklenburg* rule, it by no means directed that its commands be obeyed everywhere."

In the case at bar the District Judge held, as set out hereinabove, that the School Board has at all times acted in good faith and has at all times "complied or attempted to comply with the orders and directions of the Court."

We do not believe that Boards of Education can be faulted for the residential patterns of a city, or for the heavy concentration of black or white population in cer-

tain areas, or for the mobility of both races. These are matters over which the school system has no control, neither does it have authority to assume such control. It has always been the practice in the American educational system, until recently, to locate schools near residences, and these schools have been known as neighborhood schools. Neighborhood schools enabled parents of children to participate in the school's operation, enabled the children to engage in other activities and to associate with their friends and neighbors, and even to walk to and from school. Destruction of the neighborhood school system deprives both parents and their children of these advantages, and can even lower the quality of education. "School Desegregation After Swann," Univ. of Chicago Law Review, Vol. 39 No. 2, Winter 1972, at 444.

III

BURDEN OF PROOF

Ordinarily where a dual system has been maintained, the burden of proof rests upon the School Board to establish that present racial imbalances in a particular school are not the result of past discriminatory actions of either the Board or even the state, although the cases are not very clear as to just how or in what manner the Board can ever meet such a heavy burden. But in a case like ours, where the Board has complied with the desegregation orders of the Court, and the plaintiffs have filed motions for further relief, it would seem to us to be only fair that plaintiffs should have the burden to prove that they are entitled to such further relief. The Board ought not to have the burden of disproving every contention which the plaintiffs may see fit to make in this case. In our judgment the Court erred in placing on the defendants the burden of proof in resisting plaintiffs' motion for further relief.

IV

MAXIMIZING INTEGRATION

The District Court further required the Board to establish that it had taken affirmative action to "maximize integration" in all feasible ways as required by *Kelley* and *Robinson*. The Supreme Court in *Davis* held that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation." We have not found where the Supreme Court has used the words "maximize integration". If maximize desegregation and maximize integration mean one and the same thing, then the use of these words would be proper. The difficulty is that the District Court may well have understood the words to require integration of the races by fixed numbers or quotas in each public school in the system, regardless of where the pupils live, and regardless of their economic circumstances. We do not believe the law requires any such thing.

It should be pointed out that there is a marked distinction between voluntary busing and induced or forced busing in the effect on the children involved and their parents. No one can have any objection to the school system furnishing transportation from the child's residence to the school nearest thereto. It is something entirely different when the child by reason of a Court order is assigned away from his neighborhood school and is required to be transported to another school (whether by his parents' car or by induced busing) some distance away from his home.

Brown I speaks of the feeling-of-inferiority effect on children as the result of discriminatory state action where the children are not permitted to attend certain public schools because of the color of their skin. This condition would seem to persist still if children of both races are

prohibited from attending schools nearest to their residences, merely because of the color of their skin, and are required to be taken elsewhere to school.

V

PRACTICALITIES

In considering desegregation plans the District Court must take into account the practicalities of the proposals. These include the cost thereof, how such proposals may affect the rights of the children involved in the assignments, induced busing, and the educational achievement of such proposals.

Boards of Education do not have unlimited funds to adopt any program which they please. Funds can be raised by taxation and appropriation. In the present case the Board of Education does not have the power to levy taxes or to appropriate funds to carry out its programs. Only the Board of Commissioners of the city has such power and authority. That Board was not made a party to the case in the District Court until after the desegregation orders had been entered by the Court. We would assume that the Board of Commissioners has already appropriated the funds for the 1972-73 school year. If so, we do not know how an expenditure of $500,000 for buses would affect operation of the schools. The District Court has not ordered the Board of Commissioners to appropriate funds to provide for the transportation of pupils, and we do not consider in this appeal the question whether it has the power to enter any such order.

In our judgment the mere fact that the District Court at one time considered the Board of Education in compliance, did not preclude the Court from holding otherwise when considering the case in the light of more recent decisions.

Upon remand, the Court no doubt will want to consider the recent article by David J. Armor on "The Evidence On Busing." in *The Public Interest*, No. 28, Summer 1972, page 90, which article contains some evaluations of the effects of busing on black pupils. In *Brown I* the Supreme Court considered articles by sociologists, and we would see no objection to the District Court doing likewise.

In our judgment a quota system can invidiously discriminate in favor of one race against other races. Such a system can lower the quality of education and educational achievement and polarize the races.

VI

THE DISSENT

We do not understand the purpose of attaching as Appendix "A" Tennessee Statutes which are no longer in force because the Supreme Court of Tennessee held the same unconstitutional in 1956. *Roy v. Brittain*, 201 Tenn. 140, 257 S.W.2d 72. Nor do we understand the purpose of the attachment of "A Brief Critique of Dr. Armor's 'The Evidence on Busing'."

The complete history of the de jure system in the Tennessee public schools is well known and has been portrayed fully in previous decisions of this Court, which decisions are cited in the dissent.

Dr. Armor's article, as well as the critique, had best be considered in the first instance upon the remand which we ordered.

The decisions of individual Justices of the Supreme Court on applications for a stay under the provisions of § 803 of the Education Amendments of 1972, Pub.L. 92-318, § 803 (June 23, 1972) are not relevant here in view of

our remand of these appeals to the District Court for further consideration.

The Education Amendments are relevant, however, for consideration by the District Court on the issue of practicality because of provisions therein which operate to deprive the Board of Education of federal funds to carry out the busing order of the District Court.

While wide and almost unprecedented authority and discretion have been conferred on District Courts in their consideration of school desegregation cases, by the very nature of things such authority is not unlimited.

There seems to have grown up across the land an idea by most United States District Judges that extensive busing must be ordered to obey the commands of *Brown I* and *II*. They turn to *Swann* for their authority. *Swann* did not decide anything of the kind. In the case before us, as was true in other decisions, this Court had approved the conduct of various Boards of Education who made an honest effort to establish a unitary system. If now every order involving schools requires busing, the question may well be asked, "What next?"

As we pointed out, the District Court previously found compliance by the Board of Education with its desegregation order. It was only upon the rendition of new decisions by either the Supreme Court or this Court, that the District Court determined that such compliance had not achieved a unitary system. Such system cannot be achieved, according to the plaintiffs, until there is a fixed racial quota in each and every school in the system, irrespective of where the children live. Their program seems to be based on a head count, and requires busing, with little or no regard for the wishes of the children or their parents, the cost and feasibility of such program, the effect on existing educational programs, educational achieve-

ment of the children, or their safety, or their constitutional rights.

Remanded for further consideration.

EDWARDS, Circuit Judge, dissenting. Much as I respect my two brothers who constitute the majority of this panel, I would be less than candid if I did not say that I believe their opinion in this case represents a repudiation of settled constitutional law in *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis v. Board of Commissioners*, 402 U.S. 33 (1971) and *Brown v. Board of Education I*, 347 U.S. 483 (1954); *Brown v. Board of Education II*, 349 U.S. 294 (1955), to name only four of the most important and controlling Supreme Court precedents.

It is in my view also completely inconsistent with opinions of this court in which the great majority of the members of this court have joined: *Monroe v. Board of Commissioners of City of Jackson*, 427 F.2d 1005 (6th Cir. 1970); *Robinson v. Shelby County Board of Education*, 442 F.2d 255 (6th Cir. 1971); *Davis v. School District of the City of Pontiac*, 443 F.2d 573 (6th Cir. 1971); *Oliver v. School District of the City of Kalamazoo*, 448 F.2d 635 (6th Cir. 1971); *Kelley v. Metropolitan County Board of Education*, ... F.2d ... (6th Cir. 1972) (Decided May 30, 1972); *Northcross v. Board of Education of Memphis City Schools*, ... F.2d ... (6th Cir. 1972) (Decided August ...., 1972). Under all of these cases the facts in this case call for our affirmance of the District Judge's opinion and judgments. As I see it he has done nothing more than follow the clear mandate of the Supreme Court and this court in the cases cited above.

If there could be any doubt about the continued validity of the cases cited above, it would have to be due to quite recent changes in composition of the Supreme Court or

to the adoption of § 803 of the Education Amendments of 1972, Pub. L. 92-318, § 803 (June 23, 1972), by the United States Congress. I feel any such doubt has been completely dispelled by the actions of the Supreme Court this summer.

On the § 803 issue an opinion of Mr. Justice Powell denying application for a stay in the Augusta, Georgia, desegregation case is directly in point:

> This reapplication is premised solely on the contention that a stay is required under § 803 of the Education Amendments of 1972. That section reads in pertinent part as follows:
>
> "in the case of any order on the part of any United States District Court which requires the transfer or tranportation of any student . . . *for the purpose of achieving a balance among students with respect to race* . . ., the effectiveness of such order shall be postponed until all appeals . . . have been exhausted. . . ." Education Amendments of 1972, Pub. L. 92-318, § 803 (June 23, 1972) (emphasis added).

By its terms, the statute requires that the effectiveness of a district court order be postponed pending appeal only if the order requires the "transfer or transportation" of students "for the purpose of achieving a balance among students with respect to race." It does not purport to block all desegregation orders which require the transportation of students. If Congress had desired to stay all such orders it could have used clear and explicit language appropriate to that result.

In § 802(a), which precedes § 803, Congress prohibited the use of federal funds to aid in any program for the transportation of students if the design of the program is to "overcome racial imbalance" or to "*carry out a plan of desegregation.*" Education Amendments of 1972, Pub.

L. 92-318, § 802(a) (June 23, 1972) (emphasis added). It is clear from the juxtaposition and the language of these two sections that Congress intended to proscribe the use of federal funds for the transportation of students under *any* desegregation plan but limited the stay provisions of § 803 to desegregation plans that seek to achieve racial balance.

In light of this Court's holding in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), it could hardly be contended that Congress was unaware of the legal significance of its "racial balance" language. In that case the school authorities argued that § 407(a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000c-6, restricted the power of federal courts in prescribing a method for correcting state-imposed segregation. THE CHIEF JUSTICE's interpretation of § 407(a), which applies only to orders "seeking to achieve a racial balance," is controlling here:

> "The proviso in [§ 407(a)] is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from the courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." 402 U. S., at 17-18 (emphasis in original).

* * * * * * *

For the purpose of acting on this application, I accept the holdings of the courts below that the order was entered to accomplish desegregation of a school

system in accordance with the mandate of *Swann* and not for the purpose of achieving a racial balance. The stay application must, therefore, be denied.

Drummond v. Acree, ... U.S. ... (1972) (Decided September 1, 1972).

Subsequent to Justice Powell's denial of a stay, the same motion was presented to Chief Justice Burger and on September 8, 1972, was denied by him. There is no legal or constitutional difference between the Augusta case (*Acree v. County Board of Education of Richmond County, Georgia,* 458 F.2d 486 (1972)) and the one we deal with from Chattanooga.

Similar denials of stays have been entered in relation to similar § 803 applications by Mr. Justice Rehnquist on August 22, 1972, in the case of Oklahoma City (*See Board of Education of Oklahoma City v. Dowell,* 338 F. Supp. 1256 (W.D. Okla. 1972)) and on August 25, 1972, in the case of Nashville, Tennessee (*See Kelley v. Metropolitan County Board of Education of Nashville, Tenn.,* 436 F.2d 856 (1970), *on remand,* ... F. Supp. ... (M.D. Tenn. 1971), ... F.2d ... (6th Cir. 1972)).

Another such denial of a § 803 stay was entered September 5, 1972, by Mr. Justice Douglas in *Guinn v. Kelley, Supt. of Schools of Clark County School District, Nevada,* ... U.S. ... (1972).

See also Keyes v. Denver School District, 396 U.S. 1215 (1969); *Winston-Salem/Forsyth County Board of Education v. Scott, et al.,* 404 U.S. 1221 (1971); *Guey Heung Lee v. Johnson,* 404 U.S. 1215 (1972); *Jefferson Parish School Board v. Dandridge,* 404 U.S. 1219 (1971).

All of these denials of stay are fundamentally based upon the continued vitality of the four unanimous Supreme Court opinions cited in the first paragraph of this dissenting opinion.

In the last opinion in chambers cited above, Mr. Justice Marshall said:

> The devastating, often irreparable, injury to those children who experience segregation and isolation was noted 17 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954). This Court has repeatedly made it clear beyond any possible doubt that, absent some extraordinary circumstances, delay in achieving desegregation will not be tolerated. See, *e. g., Alexander v. Holmes County Board of Education*, 396 U. S. 19 (1969); *Carter v. West Feliciana Parish School Board*, 396 U. S. 226 (1969); *Keyes v. School District No. 1*, 396 U. S. 1215 (1969) (BRENNAN, J., vacating stay).
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> *Jefferson Parish School Board v. Dandridge, supra*, at 1220.

There are no "extraordinary circumstances" in the instant appeal.

This is a classical school desegregation case concerning a city, Chattanooga, which historically has maintained a dual school system segregated by race, and a state, Tennessee, which historically by law has sought to require its school boards to maintain segregated school systems. (See Appendix A.) The District Court order appealed from requires the appellant Board of Education of the City of Chattanooga to proceed with desegregation of its elementary and junior high school systems by the fall term of 1972 and to propose a plan for doing the same in relation to its high school system by June 15, 1972.

Three separate appeals have been perfected from the District Judge's order. In the main cases, 71-2006 and 71-2007, the Board of Education appeals and the plaintiffs appeal from the District Judge's desegregation order addressed to the Chattanooga Board of Education. In No. 72-1443, the Board of Commissioners of Chattanooga (the

city council) appeals from the same order referred to above, but on the additional ground that it, by implication, would require an expenditure of city funds on the part of the Board of Commissioners of Chattanooga, which has only recently been made an intervening defendant.

The appeals in these cases are here on the merits, along with a motion for stay of the District Judge's order pending appeal. The positions of the principal appellants are as follows:

Plaintiffs' appeal asserts that the delays in integrating the Chattanooga school system have been endless; that the order of the District Judge now entered will not accomplish the desegregation contemplated by applicable Supreme Court cases; that there is no final order as yet for desegregation of the four high schools which are, according to plaintiffs, still clearly segregated, and that the order entered by the District Judge, by dint of closing several black schools and requiring the black children in the youngest grades to be bused to white schools, invidiously discriminates against them in the remedial measure chosen.

Appellant School Board contends that the District Judge's order misinterprets Chief Justice Burger's opinion for the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), by proposing a plan directed to achieve "a racial balance," and further, improperly requires transportation of school children.

The Board of Commissioners argues that the effect of its being made a party defendant is to make it vulnerable to contempt proceedings if it fails to appropriate the necessary funds to finance the plan contemplated by the District Judge's order. The Board of Commissioners points out that it had not been a party to the principal litigation until very late in the proceedings and had not had (although it requested it) an opportunity to litigate the

issues. The Board of Commissioners also puts forward the identical arguments as to the merits of the case advanced by the Board of Education of the City of Chattanooga.

The lengthy history of this litigation is a necessary predicate to discussion and decision of the stated issues.

Procedural History

Apr. 6, 1960—This complaint was filed.

Nov. 13, 1961—*Mapp v. Board of Education of City of Chattanooga*, 295 F.2d 617 (6th Cir. 1961), affirmed a District Court order directing the Board to file a desegregation plan.

Apr. 20, 1962—*Mapp v. Board of Education of City of Chattanooga*, 203 F.Supp. 843 (E.D. Tenn. 1962). District Court orders Board to desegregate its schools within a period of not more than eight years. Court retained ju- 1962), except for provisions relating to risdiction. *Aff'd*, 319 F.2d 571 (6th Cir. technical and vocational courses.

Nov. 26, 1963—Order entered desegregating Chattanooga Technical Institute.

Dec. 31, 1963—Further order desegregating all vocational and technical courses.

Mar. 29, 1965—Plaintiff moves for further relief, seeking acceleration of the plan for desegregation, including desegregation of faculty and supervisory personnel.

Feb. 27, 1967—*Mapp v. Board of Education of City of Chattanooga*, 373 F.2d 75 (6th Cir. 1967). District Court order accelerating desegregation affirmed, except with regard to

faculty assignments for which further proceedings were ordered.

Mar. 29, 1967—Case restored to the docket for further consideration of the issue of faculty assignments.

Dec. 31, 1968—Plaintiffs file motion for further relief, seeking temporary injunctive relief, to be followed by permanent injunction.

Nov. 14, 1969—Plaintiffs file motion for immediate relief

Feb. 19, 1971—Evidentiary hearing set for April 1, 1971 on foregoing plaintiffs' motions filed.

Apr.-May 1971—Hearings held on plaintiffs' motions.

May 19, 1971—Opinion issued from the bench. (1) School system was found to be unconstitutional; (2) Desegregation plans ordered.

July 26, 1971—Memorandum and findings entered by District Court. (Plan submitted by Board approved concerning provisions for elementary and junior high schools. Tentative approval for portion of Board plan respecting high school.)

Aug. 5, 1971—District Court files order directing implementation of Board plan approved July 26, 1971, where reasonably feasible by 1971-72 school year. Time was allowed for delayed implementation where staffing and transportation equipment had to be acquired.

In the very first consideration of this case by this court, Judges Miller, Weick and O'Sullivan noted:

> It was not controverted that the Board has pursued a policy of operating a biracial school system; that the

system was established almost a century ago and has been continued by the members of the present Board. Although more than five years have elapsed since the Supreme Court held racial segregation in the public schools to be a violation of constitutional rights no plan for desegregation had been adopted by the Board until ordered by the Court.

The Board contends that after the second Brown decision it publicly announced its policy of compliance with the decision and engaged in extensive educational activities to elucidate said policy to the people of the community in order to bring about public acceptance of desegregation. It claims that these activities constituted the first step in its plan of implementation of said policy. It asserts that it had not adopted any plan for desegregation because the people in the community were not ready for it and would not accept it. *Mapp. v. Board of Education of City of Chattanooga*, 295 F.2d 617, 618 (6th Cir. 1961). (Footnotes omitted.)

This court upheld the District Judge in rejecting a Board desegregation plan which was held to be "indefinite as to when desegregation would take place in all of the schools" and in requiring the Board to file an alternative plan to accomplish same.

This record clearly shows that the Board of Education's progress in dismantling its dual school system has been minimal from 1962 down to date. It also shows that if the Board of Education's 1971 plan as far as elementary schools and junior high schools is promptly and effectively carried out, a unitary school system as to these units will result.

Judge Wilson's opinion accurately describes what this record contains concerning these comparisons as far as the elementary schools and the junior high schools are concerned:

Elementary Schools

During the school year 1970-71, the Chattanooga School System operated 33 elementary schools. Of the ten former black elementary schools within the system, four remained all black and a total of only 30 white students attended the other six. In the 23 former white elementary schools there were 13,250 white children and 3,446 black children. Four former white elementary schools (Cedar Hill, Normal Park, Pineville, and Rivermont) remained all white. Barger had only two black students and East Lake had only three black students. Two former white elementary schools (Avondale and Glenwood) had changed to all black schools, having only three white students between them. The remainder of the former white elementary schools had ratios of black students varying from a low of 4% to a high of 64%.

The School Board proposes the accomplishment of a unitary system within the elementary schools by the closing of five elementary schools, by the pairing of 16 elementary schools, by the clustering of six elementary schools, by the rezoning of three elementary schools, leaving the attendance zones of only three elementary schools unchanged. The overall result of the defendants' plan is to achieve a racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system with but five exceptions (Barger—20% black and 80% white; Carpenter—86% black and 14% white; Long—16% black and 84% white; Rivermont—12% black and 88% white; and Sunnyside—15% black and 85% white). *Mapp v. Board of Education of City of Chattanooga, Tenn.*, 329 F. Supp. 1374, 1381-82 (E.D. Tenn. 1971).

Junior High Schools

During the school year 1970-71, the Chattanooga School System operated 12 junior high schools. Of the four formerly black junior high schools within the system, two remained all black and a total of only 9 white students attended the other two. In the eight formerly white junior high schools, there were 3,341 white students and 908 black students. One formerly white junior high school (East Lake) had only one black student. The remainder of the formerly white junior high schools had ratios of black students varying from a low of 8% to a high of 70%.

The School Board proposes the accomplishment of a unitary system within the junior high schools by closing two junior high schools and by rezoning the remaining ten junior high schools, tying them into the restructured elementary school system. The overall result of the defendants' plan is to achieve a racial ratio of not less than 30% nor more than 70% of any race in all but three junior high schools. Those three schools are Hardy, with 73% black and 27% white, Dalewood, with 29% black and 71% white, and Long, with 15% black and 85% white. *Id.* at 1383.

After noting a satisfactory Board of Education plan which desegregated the Technical High School, the District Judge described the continuing problem of the other four racially segregated high schools:

While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that

time the black high schools were zoned, but the white high schools were not. When the dual school system was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. *Id.* at 1385.

None of the facts which we have quoted from the District Judge's opinion are disputed by the parties and the record amply supports them.

Plaintiffs' Exhibit 3, the accuracy of which is undisputed, shows that as of the close of this record, 9,223 black students were attending previously all black schools, along with 48 white students. Using 90% to indicate a predominantly one-race school, we find the following situation confronting the District Judge and this court:

Previously all black schools still predominantly one race (90% or more black):

Elementary schools	10 out of 10
Junior high schools	4 out of 4
Senior high schools	2 out of 2

Previously all white schools still predominantly one race (90% or more white):

Elementary schools	12 out of 23
Junior high schools	2 out of 8
Senior high schools	1 out of 2

(These computations exclude the Technical High School.)

From Exhibit 3 we also compute the following comparisons concerning the total school population of Chattanooga's schools:

1962-63

99.6% of black children attended schools in which 100% of the students were black.

100% of white children attended schools in which 99.7% of the students were white.

1970-71

72.8% of black children attended schools in which 99.5% of the students were black.

99.6% of white children attended schools in which 79.5% of the students were white.

This record makes clear that in the sixteen years since *Brown v. Board of Education*, 349 U.S. 294 (1954), and in the eleven years of litigation between 1960 and 1971, the results may be summarized as follows:

1) Minimal integration of some previously all white elementary and junior high schools.

2) Complete failure to desegregate the previously all black elementary and junior high schools.

3) Complete failure to desegregate the high schools.

I would test the District Judge's order on this appeal against the Constitutional mandate of "equal protection of the law." The objective sought has been recently thus described by Chief Justice Warren Burger, writing for a unanimous United States Supreme Court:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be

corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S., at 437-438.

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Swann v. Board of Education*, 402 U.S. 1, 15 (1971).

This record demonstrates beyond doubt that the Chattanooga "school authorities [have] fail[ed] in their affirmative obligations" to eliminate racial discrimination "root and branch." It mandates our prompt affirmance of the order of the District Judge adopting the desegregation plan finally proposed by appellant Board of Education of Chattanooga as far as the elementary and junior high schools are concerned.

The appellate issues stated in the principal cases (Nos. 71-2006 and 71-2007) by defendant-appellant Board of Education of City of Chattanooga, although phrased as ten separate issues seems to me to be rephrasing of the issues this court dealt with recently in *Kelley v. Metropolitan Board of Education*, ... F.2d ... (6th Cir. 1972) (Decided May 30, 1972, Nos. 71-1778-79). In *Kelley* this court said:

II. The Ratio and Residual Effect Issues

Where a school system has been deliberately constructed on a segregated basis by state action, a duty inheres in the School Board to do more than to establish rules fair

on their face which simply serve to perpetuate the effects of such segregation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26, 28 (1971).

The record in this case supports the District Judge's findings that racial discrimination in school construction, assignment of temporary buildings, assignment of teachers, and assignment of students continued until the close of the record—if not beyond. The record also discloses a background of racial discrimination by means of state law which motivated much of the school segregation. (See Appendix A)

The fact that population shifts in the metropolitan school district have helped to some degree to change the racial composition of some schools during the course of litigation does not eliminate the duty of the school board to present a plan for a unitary school system.

Nor, of course, does it alter the duty of the District Court on default of the school board to require production of such a plan and order it into effect. Chief Justice Burger put the matter thus in the *Davis* case:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. School Commissioners of Mobile County, supra* at 37.

Perhaps the primary thing that the *Swann* case decided was that in devising plans to terminate such residual effects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area and to seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live.

We have noted that the District Judge in *Swann* employed a flexible 71% white to 29% black population ratio as a guide in seeking a practical plan. The Supreme Court specifically approved his doing so. *See Swann v. Charlotte-Mecklenburg Board of Education, supra* at 16, 23-24. The District Judge in this case clearly read and followed the *Swann* guideline. As to this issue, we find no error.

An earlier finding of "good faith" does nothing to excuse the defaults and failures shown by this record.

> "The measure of any desegregation plan is its effectiveness." *Davis v. School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971). *See also Green v. County School Board,* 391 U.S. 430, 439 (1968). *Kelley v. Metropolitan Board of Education, supra* at 21-22 (Slip opinion). (Footnote omitted.)

In the instant case, of course, as distinguished from the *Kelley* case, the flexible ratio chosen as a guide to its plan (no race to be represented by less than 30% or more than 70% of the student body) was one chosen by appellant Board of Education of Chattanooga, and the plan actually adopted by the District Court was one put forward by the appellant also. Since appellant, in spite of proposing the plan, has never put it into effect and is now by this appeal continuing to resist ever having to do so, it can hardly rely upon the plan as curing its default.

As to this aspect of the case, the Board of Education's failure to implement its own plan simply makes more obvious its "default" in the sense that term is used in *Swann v. Board of Education,* 402 U.S. 1, 15-16 (1971). Finally, it is worth noting that of the 49 schools operated during the 1970-71 school year, 42 had a racial composition outside the flexible ratio suggested by the Board itself in its proposed desegregation plan.

What was said concerning the plaintiffs' appeal in *Kelley* is likewise applicable to the appellate issues stated by plaintiff-appellants in this case:

IV. Plaintiffs-Appellants' Plan

Our review of this record convinces us that the District Judge's choice of the HEW plan as opposed to plaintiffs' plan was well within his judicial discretion. It may not be ideal, but to us it seems clearly to be a plan for ending a dual school system based on race and substituting therefor a unitary one. It promises to work and to work *now. Green v. County School Board of Kent County,* 391 U.S. 430 (1968).

V. Plaintiffs-Cross-Appellants' Discrimination Claim

Plaintiffs-Cross-Appellants claim that the grade school plan discriminates against Negro students in the lowest elementary grades.

The feature complained of in this issue is the transportation of black students in grades 1-4 to outlying schools, paralleled by the cross-transportation of white students in grades 5-6.[1] In this regard the HEW plan appears to follow the pattern of the school plan approved in *Swann. Swann v. Board of Education, supra* at 10. The Supreme Court made no reference to this feature, and neither in *Swann* nor in this case does the record seem to provide adequate rationale for it. We do not believe, however, that we can appropriately hold that the District Judge abused his discretion in approving the HEW plan which (like the plan in *Swann*) incorporated this feature.

It may be that this is a temporary expedient or it may be that there are practical reasons to justify it

[1] Plaintiffs-appellants' invidious discrimination claim is far less specific in this case than in *Kelley*.

for longer duration. In any event, any adverse effects of this aspect of the plan can, of course, likewise be brought to the District Judge's attention when the case is back before him. *Kelley v. Metropolitan Board of Education, supra* at 25-26 (Slip opinion).

While the *Kelley* language quoted above disposes of the basic appellate issues brought here by both defendant-appellant and plaintiffs-appellants, a special comment must be made concerning the status of the plan for desegregating the senior high schools. As to the Board of Education's plan in this regard, the District Judge plainly found it unsatisfactory other than as a temporary expedient and ordered another plan to be presented by June 15, 1972—a date which followed oral argument of this appeal. While I would affirm his order, limited as it is, I would emphasize that no approval is thereby implied as to the Board of Education's plan for the high schools in constitutional terms. I do not consider that any final order concerning a final desegregation plan for the high schools has as yet been presented to us.

I now turn to the appeal by the Board of Commissioners of the City of Chattanooga in No. 72-1443. To the extent that the brief of the Board of Commissioners seeks to argue basically the same issues set forth in the appeal of the Board of Education, said issues are disposed of above. As to the Board of Commissioners' contention that it has been denied due process, some additional facts need to be recited. This record shows that *over six months after the basic order appealed from in this case had been entered on August 5, 1971*, the following events occurred:

Jan. 14, 1972—Circuit Court of Hamilton County, Tenn. entered an order enjoining the City of Chattanooga from expending funds for purchase of transportation equipment to be used to achieve "racial balance." The state court's

ruling followed a complaint filed by a resident of Chattanooga. The state court decided that expenditure of funds by the City for transportation "to achieve racial balance" contravened TCA 49-2201, which provides:

> "49-2201. Power of boards to provide transportation.—
>
> • • •
>
> "Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another."

Jan. 24, 1972—The City of Chattanooga declared that it would not appeal the state court injunction and would consider it binding.

Jan. 25, 1972—The United States District Court ordered plaintiffs to join as defendants in federal suit all parties in state court suit. The District Court also ordered the plaintiffs to petition the court for an order directing the defendants to show cause why they should not be enjoined from complying with the state court injunction.

Jan. 26, 1972—The City of Chattanooga, the Mayor, the City Commissioners, the City Auditor, the state court plaintiff, Grannan, and counsel in the state court suit were ordered joined

as defendants in the District Court proceedings.

Jan. 28, 1972—Hearing on order to show cause why defendants should not be enjoined from complying with the state court injunction.

Feb. 4, 1972—District Court entered an order enjoining all parties from seeking either to enforce or to comply with the state court injunction in any manner. Further reports concerning plans for desegregation of the high schools ordered.

Feb. 11, 1972—The Board of Commissioners filed a motion for new trial or rehearing relating to show cause order of January 28, 1972. City in same motion sought rehearing relating to their responsibility for appropriating funds for purchase of buses.

Feb. 25, 1972—District Court denies motions for new trial or rehearing.

I do not think that these proceedings pending appeal served to change or alter in any way the posture of the Board of Commissioners in relation to the basic desegregation order of the court. The District Judge's actions were plainly taken to defend the jurisdiction of the court. They were designed only to serve the purpose of freeing the Board of Commissioners from any possible legal restraint that the obviously unconstitutional order of the Circuit Court of Hamilton County might have been thought to have imposed.

Chief Justice Burger's opinion for a unanimous Supreme Court in *Board of Education v. Swann*, 402 U.S. 43 (1970), discussed and held constitutionally invalid a North Carolina antibusing statute like TCA 49-2201:

> [T]he flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green v. County School Board*, 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.
>
> We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in *Swann, supra*, at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it. *Board of Education v. Swann, supra* at 46.

I perceive no due process deprivation of any kind concerning the proceedings pending appeal referred to above. (*See Kelley v. Metropolitan Board of Education*, ... F.2d ... (6th Cir. 1972) (Slip opinion pp. 24, 30)).

The Board of Education of the City of Chattanooga was and is clearly the proper party defendant in this school desegregation case. The obligations of the Board of Commissioners of the City of Chattanooga imposed by state law pertaining to financing the schools and levying taxes were neither increased nor diminished by the District

Judge's orders of January 26, 1972 and February 4, 1972. The Board of Commissioners was intimately aware of this litigation during all its lengthy history. Its efforts to secure a retrial of the fundamental desegregation order were completely out of time and without merit.

I refrain from extended comment upon Section V of my brothers' opinion entitled *Practicalities*. To me this section seems to be reargument of decisions made by the Supreme Court 17 years ago in *Brown v. Topeka, supra*, which have many times been reaffirmed and which this court has no power to overrule. The adverse effects of racially segregated dual school systems are not likely to be overcome without opposition or without inconvenience. Neither "practicality" has ever deterred the United States Supreme Court from ordering the dismantling of such a system by use of a desegregation plan "which promises realistically to work, and promises realistically to work now." *Green v. County School Board*, 391 U.S. 430, 439 (1968); *Alexander v. Board of Education*, 396 U.S. 19 (1969).

The result of my brothers' opinion, unless it is reversed en banc, will be to delay desegregation of the Chattanooga schools by at least another year. But meantime it will mislead many people to expect a change in constitutional law which this court has no power to accomplish.

Typical of the arguments which seem to me to be addressed to overruling *Brown v. Topeka, supra*, is reference to the Armor article "The Evidence on Busing." Because I consider it completely irrelevant to our current legal problems, I refrain from comment beyond printing Professor Thomas F. Pettigrew and his co-authors' answer to the Armor article as Appendix B to this opinion.

I would affirm the judgments of the District Court in these appeals.

APPENDIX A

CHAPTER 37

SEGREGATION OF RACES

SECTION.

49-3701—49-3703. [Unconstitutional.]

49-3701—49-3703. [Unconstitutional.]

Compiler's Note. Under the decision of Roy v. Brittain (1956), 201 Tenn. 140, 297 S. W. (2d) 72, the statutes providing for the compulsory separation of races in the field of public education are no longer in effect, and therefore these sections have been omitted. They read:

49-3701. Interracial schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. [Acts 1901, ch. 7, § 1; Shan., § 6888a37; Code 1932, § 11395.]

49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement. [Acts 1901, ch. 7, § 2; Shan., § 6888a38; Code, § 11396.]

49-3703. Penalty for violations.—Any persons violating any of the provisions of this chapter, shall be guilty of a

misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months. [Acts 1901, ch. 7, § 3; Shan., § 6888a39; mod. Code 1932, § 11397.]

49-3704. [Unconstitutional.]

Compiler's Note. This section was held unconstitutional in Kelly v. Board of Education (1959), 270 Fed. (2d) 209 and is, therefore, omitted. It read:

49-3704. Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race. [Acts 1957, ch. 11, § 1.]

CHAPTER 22—TRANSPORTATION OF SCHOOL CHILDREN

SECTION.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.

49-2210. Color and markings of buses.

49-2213. Speed limit.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.—Boards of education may provide school transportation facilities for children who live over one and one-half (1½) miles by the nearest accessible route from the school to which they are assigned by the board of education and in which they are enrolled; provided, however, that the boards of education may, in their discretion, provide school transportation facilities for children who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled, but the county shall

not be entitled to receive state transportation funds for any student, other than physically handicapped children, who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled; provided, that nothing in this chapter shall be construed to prevent a board of education from transporting physically handicapped children, regardless of the distance they live from school, under rules and regulations adopted by the state board of education with the approval of the state commissioner of education; and provided further, that said boards shall have power to purchase school transportation equipment, employ school transportation personnel, and contract for transportation services with persons owning equipment, and pay for same out of funds duly authorized in the budget approved by the quarterly county court; provided further, that said boards in employing school transportation personnel and in contracting for transportation services with persons owning, equipment are hereby authorized to enter into contracts for such services for periods of time as long as, but not exceeding, four (4) years from the date of making such contracts, it being the purpose of this section to permit a reasonable degree of employment security for such school transportation personnel.

Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another. [Acts 1947, ch. 92, § 1; 1949, ch. 233, § 1; C. Supp. 1950, § 2495.1 (Williams § 2495.2 Acts 1957, ch. 10, § 1; 1957, ch. 400, § 1; 1970 (Adj. S.), ch. 491, § 1.]

Amendment. The 1970 amendment added the last paragraph to this section.

Effective Date. Acts 1970 (Adj. S.), ch. 491, § 2. February 27, 1970.

[Note that a statute similar to the proviso in the last paragraph of the statute above was held unconstitutional by the United States Supreme Court. *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971).]

APPENDIX B

A BRIEF CRITIQUE OF DR. ARMOR'S "THE EVIDENCE ON BUSING"

Marshall Smith
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Release Date to Mass Media: Monday, September 11, 1972.

Publication: To appear as part of rebuttal article in *The Public Interest*, Winter Issue, 1972-1973.

An Overview

The article begins by establishing unrealistically high standards by which to judge the success of the racial desegregation of public schools. "Busing" works only if it leads in one school year to increased achievement, aspirations, self-esteem, inter-racial tolerance, and life opportunities for black children. And "busing" must meet these standards in *all* types of interracial schools; no mention or measurement is made of the distinction between merely desegregated and genuinuely integrated schools.

This "integration policy model," as it is labeled, is *not* what social scientists who specialize in race relations have

been writing about over the past generation. Indeed, these criteria must surely represent the most rigid ever employed for the evaluation of a change program in the history of public education in the United States.

To load the gun further, the anti-busing paper next presents selected findings from selected studies as "*the* evidence on busing." The bias here is two-fold. First, the few studies mentioned constitute an incomplete list and are selectively negative in results. Unmentioned are at least seven investigations from busing programs throughout the nation that meet the methodological criteria for inclusion and report *positive* achievement results for black students. These seven studies are widely known, not obscure, investigations.

Second, only cursory descriptions are provided of the few investigations that are reviewed. Mitigating circumstances surrounding black responses to desegregation are not discussed. For example, we are not told that educational services for the transported black pupils were actually *reduced* with the onset of desegregation in three of the cited cities. In addition, negative findings consistent with the paper's anti-busing thesis are emphasized, while positive findings from these same cities are either obscured or simply ignored. Newer studies from three of the cited cities showing more positive results are not discussed.

Positive findings are also obscured by the utilization of an unduly severe standard. Black achievement gains must be statistically significantly greater than white gains for the paper to regard "busing" a success. But such a standard ignores the possibility that *both* racial groups can make meaningful educational advances in interracial schools. Indeed, this possibility actually occurs in three of the cities mentioned by Dr. Armor. Yet he does not inform us of this dual success of desegregation; rather

"busing" is simply rated a failure because the black children did not far outgain the improving white children.

The paper's anti-busing conclusions rest primarily, however not on the incomplete review of the available evidence but on the findings from one short-term study conducted by Dr. Armor himself. This investigation focused on a voluntary busing program in metropolitan Boston called METCO. Yet this study is one of the weakest reported in the paper, for our reexamination of its data finds that it is rife with methodological defects.

Two of the major problems concern deficiencies of the control group employed. To test the effects of "busing" and school desegregation, the control group must obviously consist exclusively of children who are neither "bused" nor attended segregated schools. But our check of this critical and elementary point reveals that this not the case. Among the 41 control students at the junior and senior high school levels, records on 39 were available; and they reveal that only 16 (41%) of these 39 actually attended segregated schools in the tested year of 1968-1969. And most of the 23 desegregated children utilized buses and other forms of vehicular transportation to get to school.

Incredible as it sounds, then, Dr. Armor compared children who were bused to desegregated schools with other children many of whom were also bused to desegregated schools. Not surprisingly, then, he found few differences between them. But this complete lack of controls renders his METCO research of no scientific interest in the study of "busing" and school desegregation. And since this METCO investigation furnished the chief "evidence" against "busing," Dr. Armor's conclusions are severely challenged by this point alone.

Serious, too, is an enormous non-response rate in the second test administration, a problem alluded to by Dr.

Armor only in a footnote. The achievement results for junior and senior high students are rendered virtually meaningless by the participation of only 44% of the eligible METCO students and 20% of the eligible "control" students. For the elementary students, only 51% of the eligible METCO students and 28% of the eligible "control" students took part in both of the achievement test sessions. Compare these percentages to the generally accepted survey standard of 70 to 80%, and one can appreciate the magnitude of the selection bias introduced into the METCO results by the widespread lack of participation in the research. Efforts to compensate for these high non-response rates through the use of cross-sectional samples that also suffer from extensive non-response are insufficient.

There are other problems in the METCO study. Besides recording and clerical errors in the data, children were included who initially performed as well as the test scoring allowed and therefore could not possibly demonstrate "improvement" later. In fact, these students comprise one-sixth of all the junior high pupils tested for achievement gains. Moreover, the third administration of the attitude tests were different for the two groups. The METCO students took the tests at school and the "control" students took them at home with their parents as proctors. This faulty research design makes any conclusion about differences in racial attitudes between the two groups hazardous. These and other severe weaknesses of the METCO research, then, are so extensive as to render its findings of no importance in any review of "the evidence on busing."

The inadequate discussion of the METCO study in the article makes it virtually impossible for even the discerning reader to evaluate it properly. We uncovered its many errors only from unpublished earlier materials and from

reanalyzing the data ourselves. And this discussion is inadequate in other ways. Differential statistical standards are employed, with less rigorous standards applied to findings congruent with the article's anti-busing thesis. Differences between METCO schools are not shown; and misleading claims of consistency with other research findings are made.

From this assortment of "evidence," Dr. Armor concludes authoritatively that "busing" fails on four out of five counts. It does not lead, he argues, to improved achievement, grades, aspirations, and racial attitudes for black children; yet, despite these failures, he admits that desegregated schools do seem somehow to lead more often to college enrollment for black students.

We review each of these conclusions in detail in our full piece, and find that the picture is considerably more positive, as well as more complex, than that printed by Dr. Armor. For example, when specified school conditions are attained, competent research has repeatedly shown that desegregated, compared to segregated, schools improve the academic performance of black pupils. Other research has demonstrated that rigidly high and unrealistic aspirations actually deter learning; thus, a slight lowering of such aspirations by school desegregation can lead to better achievement and cannot be regarded as a failure of "busing." And "militancy" and "black consciousness and solidarity" are not negative characteristics, as the article asserts, and their alleged development in desegregated schools should be regarded as a further success, not a failure, of "busing." Moreover, the evidence that desegregated education sharply expands the life opportunities of black children is more extensive than indicated in the article.

Consequently, Dr. Armor's sweeping policy decision against "mandatory busing" is neither substantiated nor

warranted. Apart from the impairments and incompleteness of the cited "evidence," the paper in a real sense is not about "busing," much less "mandatory busing." Three of the cities discussed, including the primary discussion of Boston, had *voluntary,* not "mandatory," "busing." "Busing" was never cited as an independent variable, and many of the desegregation studies discussed involved some children who were not "bused" to reach their interracial schools. Indeed, in Dr. Armor's own investigation of METCO, many of the METCO children were not "bused" while many of the "controls" were.

Finally, objections must be raised to the basic assumptions about racial change that undergird the entire article. The racial desegregation of the public schools is regarded as largely a technical matter, a matter for social scientists more than the courts to decide. The emphasis is placed solely upon the adaptive abilities of black children rather than on their constitutional rights. The whole national context of individual and institutional racism is conveniently ignored, with inter-racial contact under any conditions assumed to be "integration." We are surprised such assumptions still prevail in social science in 1972; and we trust that readers will not judge the potential usefulness of competent social research to public policy by this unfortunate example.

OCT 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-313

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,

Petitioners,

—vs.—

ROBERT W. KELLEY, *et al.*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The opinion of the Court of Appeals is now reported at 463 F.2d 732 and is reprinted in the Appendix to the Petition for Writ of Certiorari at pages 25-65. The opinion of the District Court is unreported and appears in the same Appendix at pages 1-24.

Jurisdiction

The jurisdiction of this Court would be properly invoked under 28 U.S.C. § 1254.

Questions Presented

1. Whether the Court of Appeals erred in refusing to overturn the District Court's order directing the implementation of a desegregation plan, upon the basis of allegations of hardship which had never been presented to the District Court.

2. Whether the District Court's use of the system-wide ratio as a guideline in formulating an effective plan of desegregation went beyond that permitted by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

3. Whether the Court of Appeals erred in holding that petitioners had waived any objections based upon Rule 23, F.R.C.P., or in the alternative that the provisions of the Rule had been complied with.

Constitutional Provisions and Statutes Involved

This case involves the Fourteenth Amendment to the United States Constitution, and particularly the equal protection clause thereof, which provides:

> . . . nor shall any State . . . deny to any person . . . the equal protection of the laws.

This matter also involves the provisions of Rule 23, F.R.C.P.

Statement

The Statement contained in the petition is essentially correct, with the following exceptions:

1. To the extent that the language on page 4, concerning the charts which appear in the District Court's opinion at pages 21-24 of the Appendix, is interpreted as implying that the District Court required a fixed ratio at each school, the Statement is incorrect. The charts to which reference is had were made by the HEW team which submitted a plan at the request of the Court, and simply show the projected results under implementation of the plan drawn by the team. See District Court Opinion at page 10 of the Appendix.

2. The allegations contained within the report reprinted as Appendix D to the Petition were never presented to the District Court nor tested at an evidentiary hearing, although they were controverted by Respondents. Some of those hardships have been relieved, since the filing of the Petition for a Writ of Certiorari, by an order of the District Court directing the school authorities to purchase additional buses in order that all students might leave schools to return home not later than 4:00 p.m.

A more thorough history of this case is found in the opinion of the Court below, particularly at pp. 27, 28-46 of the Appendix to the petition.

Reasons for Denying the Writ

I.

The School Board first argues that the order of the District Court, affirmed by the judgment below, exceeded the bounds of its discretion under *Swann, supra,* because of the hardships imposed upon students by the plan. The Board failed to demonstrate to the District Court, prior to the entry of the order, that its good faith implementation would create such problems, but instead attacked the order

on appeal with an untested affidavit of the Superintendent describing various difficulties alleged to have resulted in the implementation of the plan. The Court of Appeals refused to overturn the District Judge but did remind the school board that "an injunctive decree in a school segregation case is always subject to modification on the basis of changed circumstances."

With that background, it is nothing short of preposterous for the school authorities to ask this Court, without any record basis whatsoever, to reverse the well considered orders of a District Court and Court of Appeals on the basis of hypothetical allegations which it ought to be very easy for the school authorities to substantiate.

II.

Like other school systems which have sought review of school desegregation orders this Term, Petitioners make the flat and bald assertion that the District Court ordered racial balance. Not only did the District Court explicitly eschew such a course of action, and not only did the Court of Appeals pointedly affirm on this issue, but even a cursory glance at the projected enrollment statistics at pages 21-24 of the Appendix to the Petition demonstrates a considerable variation among the percentage of black and white students to be assigned to each school—from 0% black to 41% black in the elementary schools alone. The "Report" filed by the Superintendent on October 19, 1971 does not set out the actual enrollment figures achieved when the plan was implemented but respondents have no reason to suspect that in fact a perfectly even racial distribution resulted.

III.

The purported issue under Rule 23, F.R.C.P. is absolutely frivolous, as the opinion below makes perfectly clear and we shall not detain the Court with elaborate arguments.

CONCLUSION

Wherefore for the foregoing reasons respondents respectfully pray that the petition be denied.

Respectfully submitted,

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